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IN THE

Supreme Court of the United States

October Term, 1971

No.

ANNETTE HEYMAN, Individually; ANNETTE HEYMAN, as Executrix of the Estate of Lazarus S. Heyman, Late of Danbury; and PRUDENTIAL MANAGEMENT COMPANY, a Connecticut corporation,

Petitioners,

v.

ROBERT S. KLINE,

Respondent

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit With Appendix

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No.

ANNETTE HEYMAN, Individually; ANNETTE HEYMAN, as Executrix of the Estate of Lazarus S. Heyman, Late of Danbury; and PRUDENTIAL MANAGEMENT COMPANY, a Connecticut corporation,

Respondent

v.

ROBERT S. KLINE,

Petitioners,

Petition For A Writ Of Certiorari To The United State Court Of Appeals For The Second Circuit

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The petitioners Annette Heyman, Individually; Annette Heyman, as Executrix of the Estate of Lazarus S. Heyman, Late of Danbury; and Prudential Management Company, a Connecticut corporation, respectfully pray that a writ of certiorari issued to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered on January 3, 1972 as modified and amended following a petition for rehearing on March 2, 1972.

OPINIONS BELOW

The opinion of the Court of Appeals, not yet reported, appears in Appendix B attached hereto. The opinion rendered by the District Court for the District of Connecticut also appears in Appendix B as do the findings of the Special Master rendered following the opinion of the District Court.

JURISDICTION.

The judgment of the Court of Appeals for the Second Circuit was entered on January 3, 1972. A timely petition for rehearing was filed by the respondent on January 14, 1972. The petition for rehearing was granted and the decision of January 3, 1972 was amended on March 2, 1972. This petition for certiorari was filed within 90 days of that date. The court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED.

1. Is there a federal policy so favoring civil trial by jury that it prevents a learned trial judge from relying on the words and actions of retained counsel in finding an effective jury trial waiver?

2. Is there a federal policy so favoring civil trial by jury that it compels the relitigation of basically equitable issues fully and fairly aired because of the assertion of some possible factual overlap with some tenuous legal claims?

3. Is there a federal policy so favoring civil trial by jury that it limits developments in the law of res judicata and collateral estoppel?

STATEMENT OF THE CASE.

This is an action arising out of a dispute between petitioners and respondent, a former employee, over ownership rights in a valuable piece of realty in Tampa, Florida. The proceedings in the trial court and the reversal in the Court of Appeals have left this case in a posture which affords this court an important opportunity to rectify the confusion surrounding the thorny issue of civil jury entitlement in the merged law-equity system of the federal courts.

I. SUMMARY OF THE PROCEEDINGS.

A. The Complaint

On February 12, 1970, petitioners filed the Complaint in the United States District Court for the District of Connecticut. Diversity jurisdiction, 28 U. S. C. A. Section 1332, with service made under the Connecticut long-arm statute, was invoked. The action sought a declaratory judgment, 18 U. S. C. Sections 2201, 2202, that respondent had no interest in a certain shopping center property in Tampa, a temporary and permanent injunction, and "such other relief as in equity may pertain". In addition damages for breach of the underlying employment contract were sought. No jury trial was requested.

At the outset of the proceedings the District Court

issued a temporary restraining order enjoining Kline, his attorneys, and others from initiating any legal proceedings with regard to the Tampa property.[1] Nonetheless, Kline did begin a suit in Florida claiming an interest in the Tampa property. In the Florida action no jury was reqeusted. The district court found the action to be in plain violation of his order and awarded petitioners the expenses they had incurred by reason of the violation. The Court of Appeals reversed because the order underlying the civil contempt was reversed. (Opinion at 186-196, holding the trial court did not need to issue the TRO to protect its jurisdiction). Review of the contempt rulings is not sought here.

B. Jury Trial Waiver

Throughout the preliminary stages of this case both sides evinced an interest in securing an early date for trial. Both were represented by competent counsel. Both sides were pressing upon the court equitable claims for injunctive relief, and speed was obviously important for all concerned. Speed was especially important to the respondent since he was the subject of the TRO and wanted the merits reached and resolved quickly so that he would be free of restraint if he prevailed.

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[1]Kline subsequently quitclaimed one-half of his alleged interest in the entirety to his wife, Jeanne Kline, who subsequently, despite actual notice, refused to reconvey that interest to petitioners. For this she was found in contempt. But the Court of Appeals for the Second Circuit ruled she was not a "nominee" and reversed the finding in a separate proceeding. **Heyman v. Kline,** 444 F.2d 65 (2 Cir. 1971).

Therefore, a full on the record discussion was held, following numerous off-the-record discussions, by the District Court, with counsel to schedule the proceedings. Counsel for defendant advised the District Court that he would be ready for trial on the merits within 30 days. This was prior to the filing of an answer and the commencement of discovery. Thus the court was made aware of both sides' interest in speed and their willingness to move quickly. It was in this context that the court endeavored to accommodate all parties by fixing a rapid schedule culminating with a trial date approximately 30 days later. With this date in mind the court said, "But I have in mind that I could handle this case in the third floor courtroom, being a non-jury case."

When the answer was subsequently filed and a jury trial was claimed petitioners moved to strike the case from the jury trial list. Following a hearing the District Court held that the jury trial had obviously been waived noting that had there been any suggestion of a right to a jury trial neither side would have been entitled to a case being preferred over some 800 jury cases on the civil docket side then pending in the United States District Court for the District of Connecticut. Respondent did not seek review by mandamus or under 28 U. S. C. Section 1292(b).

C. The Answer

Insofar as Kline's answer and counterclaims concerned the Tampa property he sought (1) the declaration of a constructive trust, (2) specific performance by petitioners of his claimed 15% inter-

est, and (3) by motion, injunctive relief. He also claimed an interest in the land by reason of an "Assignment of Option" which purported to grant him a 15% interest in the property. In addition he sought damages for breach of contract (his salary), for a lost commission, attorneys fees and punitive damages for an alleged breach of a fiduciary relationship regarding the Tampa property.

D. The Trial

The district judge (now Circuit Judge Timbers) held a full and fair hearing stretching over eight trial days. On June 26, 1970, he filed a thorough and lengthy Memorandum of Decision After Trial ruling in petitioners favor. (Appendix B, p. 25b). He found Kline had breached his employment agreement in no less than eleven specific ways. He also found there had been no effective delivery of the "assignment of option" but rather that Kline had stolen the document which was never intended to be used from his employer's files. A Special Master, appointed to find petitioners' damages attributable to Kline's breach of contract subsequently found them to $40,452.58. (App. B. p. 78b)

E. The Decisions of the Court of Appeals

Giving overriding consideration to the "importance" of the right to civil jury trial, the Court of Appeals for the Second Circuit initially held

> (1) there had been no effective waiver of jury trial and therefore Kline was entitled to one the "breach of contract" issues, and

(2) that the counterclaims and defenses based the alleged "assignment of option" need not to be retried because of its relationship solely to the equitable claims made regarding the Tampa property.

However, the court subsequently granted Kline's petition for rehearing and reversed itself, two to one, holding the issue of delivery to be relevant to Kline's claim for punitive damages.[2] (Appendix B, p. 19b)

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[2]The counts for punitive damages are ambiguous at best:

"21. As alleged above, defendant, as broker and in accordance with his employment contract, found the lessee, the Edward J. DeBartolo Corporation, prior to January 7, 1969, and the defendant had performed his employment contracts in all other respects. On January 7, 1969, counsel for Annette Heyman, as alleged above in Paragraph 11 which counsel at all times also acted on behalf of defendant, forwarded to the Edward J. DeBartolo Corporation a letter relating to plans for payments of commisisons to defendant, which letter was prepared by said law firm. On January 17, 1969, after defendant found said lessee, plaintiff, Annette Heyman, breached her obligations under the defendant's contract of employment by discharging him prior to the end of the term thereof. Upon information and belief, on February 1, 1969, plaintiff Annette Heyman, leased to the Edward J. DeBartolo Corporation, to the exclusion of defendant, the premises or real property described above. [As aforesaid, defendant reserves his rights with respect to said lease.] The plaintiff, Annette Heyman, in breaching her fiduciary relationship by excluding the defendant from participation in the Tampa real property ownership, and in breaching the defendant's employment contract, in executing a lease to the Edward J. DeBartolo Corporation to the exclusion of defendant, in receiving from defendant his participation the sum of $13,591.62 and in attempting to return same to defendant after the performance of his duties by defendant had served her purposes, acted

The Court of Appeals also rejected petitioners' "constiutionally sound" offer to waive any collateral estoppel effect in any subsequent jury trial on issues found to be common. Had such a procedure been followed, Kline would have been afforded all he was constitutionally entitled to, assuming **arguendo** there had been no jury waiver — a jury trial on his legal claims free from collateral estoppel.

REASONS FOR GRANTING THE WRIT.

Beyond the importance of this litigation to the parties (the Tampa property being worth some $2.5 million dollars) is the importance of this case as a vehicle for resolving the confusion existing in the issue of civil jury trial entitlement in the federal courts. **Beacon Theatres Inc. v. Westover,** 359 U.S. 500 (1959), **Dairy Queen Inc. v. Wood,** 369 U.S. 469 (1962), and **Ross v. Bernhard,** 396 U.S. 531 (1970)

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intentionally, insulted defendant, abused defendant, and was prompted by malice, moral turpitude, wantonness, or outrageousness of tort, in that all of her said actions were performed for the purpose of financial gain, exclusion of defendant from his rights, and other purposes known only to said plaintiff, during, at the time of, and after the performance of all of his duties by defendant in accordance with his employment contract. Moreover, plaintiff, Annette Heyman, while inducing defendant to perform his employment contract, never intended to honor her agreement to purchase the real estate for defendant (to the extent of 15 percent) or to comply with the provisions of the employment contract. The foregoing amounts to an independent tort perpetrated upon defendant by said plaintiff.

WHEREFORE, defendant sues plaintiff, Annette Heyman, for punitive damages in excess of $100,000 plus costs."

have resulted in something of an overkill where doubtful jury claims are raised. Suggesting these decisions have created an almost Pavlovian response to close jury questions, two commentators have suggested a reevaluation is in order, Shapiro & Coquillette, **The Fetish of Jury Trials in Civil Cases: A Comment on Rachal v. Hill**, 85 Harv. L. Rev. 442 (1971).

> "At a time of growing concern over crowded dockets, the size of judgments and the cost of litigation, the question whether we have more trial by jury than we want is worth asking." **Ibid** at 442.

In the context of this case we ask the questions

(1) Is there a federal policy so favoring trial by jury that it prevents a learned trial judge from relying on the words and actions of retained counsel in finding an effective jury trial waiver?

(2) Is there a federal policy so favoring trial by jury that it compels the relitigation of basically equitable issues fully and fairly aired because of the assertion of some possible factual overlap with some tenuous legal claims?

(3) Is there a federal policy so favoring trial by jury that it limits developments in the law of res judicata and collateral estoppel?

To each of these questions the response should be negative. This case affords this Court an opportunity so to assert.

(1) Jury Waiver

The Court of Appeals held that "waiver, prior to the time for demanding jury trial has begun, should be based on nothing less than the affirmative representation by the party himself, or by his duly authorized counsel, on representation to the court that the matter has been discussed with his client and that the client has determined not to exercise his right to jury trial". Such an inflexible rule, while perhaps appropriate to Sixth Amendment criminal jury waivers is hardly called for. The Court of Appeals "raison d'etre" for the rule — "the important place of the civil jury in the pantheon of our liberties" — has been seriously questioned, in view of the jury's responsibility for delay in the courts, for escalation in the size of damage awards, and for the high cost of judicial administration. Shapiro and Coquillette, **supra,** 85 Harv. L. Rev. at 455; see also J. Frank, **Law and the Modern Mind,** 770-85 (1935); Zeisel, **Delay in the Court** 71-81 (1959); Peck, **Do Juries Delay Justice,** 18 FRD 455 (1956); Note, **Ross v. Bernhard; The Uncertain Future of the Seventh Amendment,** 81 Yale L. J. 112 (1971). Note, **The Right to a Non-jury Trial,** 74 Harv. L. Rev. 1176 (1961); James, **Civil Procedure,** Sections 8.1-8.11 (1965).

Moreover, the rule promulgated by the Second Circuit appears to conflict with those cases holding waiver may be complete even though inadvertent or unintended. 9 Wright, **Federal Practice and Procedure,** 102 (1971) e.g. **Bush v. Allstate Insurance Co.,** 425 F.2d 393, 396 (5 Cir. 1970).

The Court should interpret Rule 38 of the Federal

Rules as being flexible enough to permit a jury trial waiver properly to be found by the trial judge from all of the surrounding factors including actions and comments of counsel, the basic nature of the issues, the relative importance of the legal and equitable issues in the case, and the need for prompt resolution. Cf. **Tennessee Coal, Iron & R. Co. v. Musicola Local No. 123,** 137 F.2d 176 n.10 (5 Cir. 1943) affirmed without consideration of this point 321 U.S. 590.

(2) Relitigation of Factual Issues

The Court of Appeals held that in the absence of jury waiver Kline was entitled to a jury trial on all factual issues which in any way might be considered common to the legal claims. One specific issue — that of delivery **vel non** of the Assignment of Option — is clearly related almost exclusively to respondent's equitable claims of specific performance and for imposition of a constructive trust. Only the tortuous reading of respondent's claim for punitive damages, see fn.2, **supra,** which split the panel on rehearing compels relitigation. The factor underlying the ruling is an overwhelming bias as a matter of policy in favor of civil jury trials. As noted above, the wisdom of such a bias is questionable. See commentary cited supra at p. 10.

But for this bias the Court of Appeals might well have ruled as Judge Oakes suggested in dissent that the trial judge, even without waiver, might properly have tried the equitable issues first under Rule 42(b) or alternatively considered the jury demand to cover only the contract issues. Rule 38(b), F.R.Civ.P.

This Court should permit the flexible application of Rule 42(b). It should hold the **Beacon Theatres** cases only proscribe prior court determination of common factual issues only when those issues are so interwoven with the legal issues that they cannot be ruled on separately without creating confusion. Cf. 9 Wright, **Federal Practice and Procedure,** Section 2391 (1971). Otherwise a tenuous legal claim[3] will as here prevent prompt determination of the equitable issues.

(3) Collateral Estoppel Waiver

The Court of Appeals recognized petitioners' offer to waive any collateral estoppel claim in a subsequent jury trial on the legal claims to be "constitutionally sound". But it rejected the offer for fear of the jury's reaching a verdict inconsistent with the court's. But for this obsessiveness with the jury, the Court of Appeals might well have adopted petitioners' suggestion and permitted a significant development in the law of collateral estoppel. Shapiro and Coquillette in their earlier cited article have cautioned against the reading of the **Beacon Theatres** cases as holding the Seventh Amendment to

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[3]Respondent's claim for punitive damages very likely raises no jury issue at all. For to the extent it is based on an alleged breach of contract, Connecticut law would prohibit recovery. **Triangle Sheet Metal Works Inc. v. Silver,** 154 Conn. 116 (1966); and to the extent it arises from some claimed trust relationship or partnership obligation it is an historically equitable one. 3 Scott, Trusts Section 197 p. 1625 (1967); Restatement, Trusts 2d, Section 97, B (1957); **Local 92, International Association of Iron Workers v. Norris,** 383 F.2d 735 (5 Cir. 1967).

proscribe new developments in the law of collateral estoppel and res judicata, 85 Harv. L. Rev. at 455.

Adoption of petitioners position would permit the prompt adjudication of equitable claims without detriment to a party's right to a jury trial on his legal claims. Only where the common issues of fact were central to the legal claims would a joint trial be necessary. This procedure, we suggest, would substantially speed litigation. See Note, **supra** 81 Yale L.J. at 124, (67% more time consumed in jury trials), and promote settlement. For once the difficult issues surrounding injunctions and the like were resolved, damages could more easily be assessed and compromised. Thus this Court should rule neither the Seventh Amendment nor any policy with respect to inconsistent verdicts requires relitigation of issues fairly heard and without collateral estoppel effect.

CONCLUSION.

It is respectfully submitted the Court should grant petitioners' prayers for a Writ of Certiorari.

Respectfully Submitted,

J. DANIEL SAGARIN, ESQUIRE
855 Main Street — Suite 911
Bridgeport, Connecticut 06603

CERTIFICATE OF SERVICE

I hereby certify that three (3) copies of the foregoing petition have been served by first class U. S. Mail, postage prepaid, on John R. Bush, Esq., P.O.

Box 1531, Tampa, Florida, 33601, William B. Rush, Esq., 855 Main St., Bridgeport, Conn. 06603; and Harvey Oshins, Esq., 77 Tarrytown Rd., White Plains, N. Y. this 30 day of May, 1972.

J. Daniel Sagarin

APPENDIX

IN THE

Supreme Court of the United States

October Term, 1971

No.

ANNETTE HEYMAN, Individually; ANNETTE HEYMAN, as Executrix of the Estate of Lazarus S. Heyman, Late of Danbury; and PRUDENTIAL MANAGEMENT COMPANY, a Connecticut corporation,

Petitioners,

v.

ROBERT S. KLINE,

Respondent

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit With Appendix

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APPENDIX A
CONSTITUTIONAL PROVISIONS AND STATUTES

CONSTITUTION OF UNITED STATES AMENDMENT VII — CIVIL TRIALS

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

FEDERAL RULES OF CIVIL PROCEDURE

Rule 38.

JURY TRIAL OF RIGHT

(a) Right Preserved. The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate.

(b) Demand. Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue. Such demand may be indorsed upon a pleading of the party.

(c) Same: Specification of Issues. In his demand a party may specify the issues which he wishes so tried; otherwise he shall be deemed to have

demanded trial by jury for all the issues so triable. If he has demanded trial by jury for only some of the issues, any other party within 10 days after service of the demand or such lesser time as the court may order, may serve a demand for trial by jury of any other or all of the issues of fact in the action.

(d) Waiver. The failure of a party to serve a demand as required by this rule and to file it as required by Rule 5(d) constitutes a waiver by him of trial by jury. A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties.

RULE 39 (b)

By the Court. Issues not demanded for trial by jury as provided in Rule 38 shall be tried by the court; but notwithstanding the failure of a party to demand a jury in an action in which such a demand might have been made of right, the court in its discretion upon motion may order a trial by a jury of any or all issues.

RULE 42 (b)

Separate Trials. The court, in furtherance of convenience of to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues, always preserving inviolate the right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States.

APPENDIX B

OPINIONS AND JUDGMENTS BELOW

OPINION OF UNITED STATES COURT OF APPEALS FOR SECOND CIRCUIT OF JANUARY 3, 1972

UNITED STATES COURT OF APPEALS
For The Second Circuit

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Nos. 1057-60—September Term, 1970.
(Argued July 15, 1971 Decided January 3, 1972.)
Docket Nos. 35418-9, 35625-6

———◆———

ANNETTE HEYMAN, Individually; ANNETTE HEYMAN, as Executrix of the Estate of Lazarus S. Heyman, Late of Danbury; and PRUDENTIAL MANAGEMENT COMPANY, a Connecticut corporation,

Plaintiffs-Appellees,

—v—

ROBERT S. KLINE, JOHN R. BUSH AND HARVEY B. OSHINS,

Defendants-Appellants.

———◆———

Before:

FRIENDLY, Chief Judge,
LUMBARD and OAKES, Circuit Judges.

———◆———

Appeal from a judgment of the United States District Court for the District of Connecticut, Timbers, J., holding that appellant had breached his employment contracts and that an assignment to appellant and others of an option in a parcel of Tampa, Florida land never became effective; enjoining appellant from claiming any interest in parcel of Tampa, Florida land; awarding appellee $40,452.58 damages; and holding appellant and his attorneys in civil contempt.

Affirmed in part, and reversed in part for trial before a jury.

JON O. NEWMAN, Hartford, Connecticut, attorney for appellees.

JOHN R. BUSH of Macfarlane, Ferguson, Allison & Kelly, Tampa, Florida and William B. Rush of Pullman, Comley, Bradley & Reeves, Bridgeport, Connecticut, for appellant.

LUMBARD, Circuit Judge:

Robert Kline appeals from a judgment of the District Court for Connecticut which held that defendant Kline, a citizen of Florida, had breached his employment contracts with plaintiffs, all citizens of Connecticut, and that a July 16, 1968, assignment to Kline, among others, by Annette Heyman of an option in a piece of Tampa, Florida, real estate never became effective. The court awarded plaintiffs $40,452.58 damages for breach of the employment contracts, declared that Kline was entitled to no in-

terest in the Tampa real estate either under the July 16 assignment or as consideration for his employment services, and enjoined him from bringing any suits or making any claims regarding the property.[1]

Kline and his attorneys, Harvey B. Oshins and John R. Bush, also appeal from that part of the court's judgment holding them in contempt for filing suit in the Hillsborough County Court of Florida to determine title to the Tampa land after the district court had issued a temporary restraining order (TRO) enjoining such a suit.

We hold that Kline was improperly denied a jury trial on the question of whether he had breached his

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[1] After the court's order had issued plaintiff began a contempt proceeding by serving an order to show cause why Kline and his wife Jeanne Kline should not be held in contempt for failure to comply with the court's judgment. Kline had purported to assign one-half of his interest in the land to Mrs. Kline in August 1969. Kline appeared in the proceeding and executed a quitclaim deed suggested by the court and plaintiff withdrew her application for a contempt order against him.

Mrs. Kline, who was never a party to this proceeding, appeared specially and presented the defense that the district court lacked jurisdiction over her in both the plenary action and the contempt proceeding. The court held that it did have jurisdiction and a final judgment of contempt was entered against her.

This court reversed, holding that Mrs. Kline was neither a "nominee" of Kline nor in "active concert or participation with him," see Rule 65(d), F.R.Civ.P., and that the district court lacked jurisdiction over her. **Heyman v. Kline**, 444 F.2d 65 (2d Cir. 1971).

employment contracts and whether he was entitled to punative damages; accordingly we reverse and remand for a jury trial of the issues surrounding the alleged breach. For reasons to be developed, the judgment that Kline had no interest in the Tampa real estate also is reversed insofar as his claim rests upon the employment contracts. The district court's judgment is affirmed, however, with respect to the ineffectiveness of the July 16 assignment. Finally, we hold that the district court was incorrect in issuing a TRO enjoining the filing of any other suits regarding the land. Since the right to remedial relief falls when an erroneously issued injunction is vacated, we reverse the judgments of civil contempt.

The facts of this case, undisputed except where otherwise noted are as follows:

Robert Kline was employed by Lazarus Heyman, Mrs. Heyman's husband and testator, pursuant to a written contract of March 31, 1968. The contract provided that Kline would work exclusively for Heyman in the development of real estate, particularly a 73-acre parcel of Tampa, Florida land on which Heyman had an option. In consideration for his services, Kline was to receive $20,000 per year, and a bonus if Heyman determined that one was appropriate. Kline was entitled to use the bonus money to invest as a partner to the extent of 15% in any of Heyman's real estate ventures.

In May, 1968, Lazarus Heyman died. Shortly thereafter, Kline and Mrs. Heyman orally agreed to continue Kline's employment contract. On June 15, 1968, and again on July 15, 1968, Mrs. Heyman, as

executrix of her husband's estate, paid $5,000 to renew the option on the Tampa, Florida land. On the advice of tax counsel, Mrs. Heyman, as executrix, executed an assignment of the option to herself, to her son, Samuel, to her daughter, Abigail, and to Kline on July 16, 1968. Mrs. Heyman signed only the ribbon copy which was given to Samuel to hold for her. The signed copy was allegedly subsequently discovered by Kline who made a xerox copy which, on September 16, 1969, he recorded in Hillsborough County, Florida, where the land is located.

Kline continued to work for Mrs. Heyman under the oral agreement until September 9, 1968, when they signed a new written agreement. The agreement provided that Kline would work as a developer of real estate for the Heymans and would have the right to participate in any real estate ventures entered into by the Heymans to the extent of 15%. The contract also recited that it was "understood" that Kline had "opted to participate to the extent of 15% in our Tampa venture" and that, "[a]s a 15% partner," he would be liable for his proportional share of the expenses. In accordance with his arrangement with the Heymans concerning the sharing of expenses associated with the acquisition of the Tampa land, Kline made several payments through December 1968 which totalled $13,591.62.

In August 1968, Mrs. Heyman exercised the option and the closing took place on December 9, 1968. According to Kline's brief, his interest "would have amounted to $600,000.00 to $1,000,000.00 less his 15% share of principal and costs."

In January 1969, Annette Heyman discharged Kline for alleged breaches of his employment contract. At trial Judge Timbers found, after hearing disputed evidence, that Kline had committed "numerous material" breaches of his employment contracts: **e.g.**, submitting fraudulent expense vouchers; performing real estate services for persons other than the Heymans in violation of the exclusivity provision of the contract; accepting a kickback from one of the tenants.

On appeal, Kline argues that the district court erroneously denied his timely filed written demand, under Rule 38, F.R.Civ.P., for a jury trial on all issues so triable. We agree. Kline was denied a jury trial despite his demand therefor, because the district judge found that he had waived his right to jury trial by his counsel's actions at a pretrial conference. In our view, the record does not show any waiver of Kline's right to jury trial.

On February 12, 1970, approximately 13 months after Kline had been discharged, Annette Heyman filed suit in the District of Connecticut seeking damages for Kline's breach of contract and asking for injunctive and declaratory relief to the effect that Kline had no interest in the Tampa property. At the same time, to bar Kline from initiating any legal proceedings with respect to the land, the plaintiff moved for a TRO which Judge Timbers signed that day. No notice of this application was given to the defendant or his counsel and Mrs. Heyman's counsel merely asserted in the application that notice should not be required because "to do so would permit the immediate and irreparable injury, loss and damage to

plaintiff Annette Heyman described in the verified complaint. . . ."[2] After Judge Timbers signed the TRO at 4:00 p.m. it was personally served on Kline at 11:30 that night in Largo, Florida.

On February 13, 1970, Kline filed a quiet title suit in the County Court of Hillsborough County, Florida, alleging his 15% interest in the 73-acre tract in Tampa.

On February 20, 1970, counsel for both parties appeared before Judge Blumenfeld in Bridgeport. Thomas J. Dolan, Esq., appeared specially for Kline and filed a motion to dismiss the complaint for lack of jurisdiction. It was agreed by counsel that the ruling on that motion and the hearing on the plaintiff's motion for a preliminary injunction should be postponed until February 24 when they could be

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[2] There is considerable doubt that the plaintiff made an adequate showing under Rule 65(b) of the Federal Rules of Civil Procedure to justify the granting of the TRO without notice. The only allegation in the complaint that supported the TRO was that "[d]efendant's threatened conduct . . . may prevent plaintiff Annette Heyman and her tenant from obtaining financing for the proposed shopping center and cause plaintiff Annette Heyman's tenant to terminate said lease . . . ." It is unlikely in the extreme that any such dire consequences would have resulted from the short delay needed to notify Kline or his attorney so that they might be heard on the application for a TRO. Moreover, Mrs. Heyman's attorney made no certification to the court of "reasons supporting his claim that notice should not be required." The fact that Kline was served in Florida less than eight hours after the TRO was signed and filed in Bridgeport would seem to indicate that notice could in fact have been given him. Rule 65(b)(2), F.R.Civ.P.

heard by Judge Timbers who had issued the TRO. It was also agreed that the TRO would remain in effect until then.

On February 24, 1970, counsel for Mrs. Heyman filed a motion charging Kline, his New York counsel, Harvey B. Oshins and his Florida counsel, John R. Bush, with contempt, alleging that the TRO had been violated when Kline's lawsuit was filed in Florida. The hearing of this motion and of the other pending applications were postponed until March 3, 1970 by agreement of counsel.

On March 3, 1970, Judge Timbers heard Kline's motion to dismiss and later denied it with an opinion filed March 19, 1970.[3] Hearing on the motions for a preliminary injunction and contempt was postponed until March 25, 1970, Kline's counsel consenting to continuance of the TRO.

On March 25, Judge Timbers held an extended conference with counsel in his chambers in order to

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[3] Kline advances that contention in this court, arguing that Mrs. Heyman has really brought a quiet title suit regarding Florida land in a Connecticut court. A quiet title proceeding, of course, takes place only in the state of the res. **Huntington v. Attrill,** 146 U.S. 657, 669 (1892). However, Kline's argument founders on the case of **Massie v. Watts,** 10 U.S. (6 Cranch) 148 (1810). There Chief Justice Marshall distinguished between a quiet title proceeding and a case in which the relief requested might affect title, but title is dependent on the construction of a contract between two parties. In the latter case, a court of equity could take jurisdiction over the parties and order any necessary equitable relief. See **United States v. Ross,** 302 F.2d 831 (2d Cir. 1962).

schedule the hearings on the motion for a preliminary injunction and the motion to adjudge Kline and his attorneys in contempt. Neither party was present. Mrs. Heyman was represented by her attorneys, Jacob D. Zeldes and John R. Needle, and Kline by his attorney, Thomas J. Dolan. After some discussion, Judge Timbers suggested that the parties agree to the use of the Rule 65(a)(2), F.R.Civ.P., procedure by which trial on the merits could be consolidated with the hearing for a preliminary injunction.[4] He also suggested that the contempt motion be heard on the same date. During this discussion, which was concerned solely with the mechanics of scheduling, the following colloquy took place:

Judge Timbers: . . . .

> And I would say that I would hope to handle it myself, simply because I have been familiar with it and I have had it up to this point and it would probably save some time.
>
> . . .

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[4] Rule 65(a)(2) provides:

> **Consolidation of Hearing With Trial on Merits.** Before or after the commencement of the hearing of an application for a preliminary injunction, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application. Even when this consolidation is not ordered, any evidence received upon an application for a preliminary injunction which would be admissible upon the trial on the merits becomes part of the record on the trial, and need not be repeated upon the trial. This subdivision (a)(2) shall be so construed and applied as to save to the parties any rights they may have to trial by jury.

But I have in mind that I could handle this case in the third floor courtroom, being a non jury case, and I will try to keep myself open to handle it if counsel could agree on that date.

But I think I might also say, if there is agreement on a day and we set it firmly, I will insist we go forward; and I think it really should be a peremptory assignment, barring illness on the part of counsel or the judge.

Mr. Zeldes (for plaintiff): Is that satisfactory to you, that date [Pause] I think it may squeeze me, Your Honor.

Mr. Dolan (for defendant): I am quite certain it is, your Honor. I don't have my client here. I would have to call him.

But I see that this would have to take precedence over anything that he will have on his schedule.

Mr. Dolan for the defendant Kline, also pointed out that he would have to file an answer and a "cross complaint" seeking relief against the plaintiff. It was agreed that the answer and counterclaim would be filed by April 2, the plaintiff would close the pleadings by April 9 and that all discovery was to be completed by April 20. Judge Timbers then set the case for April 27, 1970.

On March 31, 1970, Kline filed his answer and counterclaim. Specifically, he sought damages for breach of his employment contract with Annette Heyman, and on the basis of the employment contracts and the July 16 assignment of the option, he

requested various forms of equitable relief with a view to establishing his interest in the Tampa land. The answer and counterclaim were accompanied by a written demand for a jury trial.[5]

Mrs. Heyman then moved to strike the demand for a jury and, after argument on April 20, Judge Timbers granted the motion. In striking the demand he said, "[I]f there had been any basis for claiming a jury trial, it seems to me then [March 25] and there was the time to say so. If you are talking about Rule 65 you are talking about equitable proceedings. . . . [T]here was—to me anyway—a clean and unequivocal agreement to try this case to the Court without a jury as to all issues."

We disagree. "Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care." **Dimick v.**

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[5] Kline's answer in which he demanded a jury trial was sworn to by him in Florida on March 27, 1970. It appears to have been prepared by his Florida attorney, John R. Bush. Kline's Connecticut attorney, Thomas J. Dolan, withdrew on April 8, and was replaced by William B. Rush who had filed appearance on April 1st. The appellee's brief argues that this change of counsel was made to avoid the alleged March 25 "waiver" of jury trial by counsel on behalf of Kline. It is noteworthy that Mrs. Heyman also changed counsel after the March 25 conference. Jon O. Newman appeared on April 2, 1970 in place of Jacob D. Zeldes.

In any event, we hold that short of a party's consent, or authorization of counsel to consent, there could be no effective waiver except by operation of Rule 38, F.R.Civ.P.

Schiedt, 293 U.S. 474, 486 (1935). "[T]he right of jury trial is fundamental, [and] courts [must] indulge every reasonable presumption against waiver." **Aetna Insurance Co. v. Kennedy,** 301 U.S. 389, 393 (1937). The Federal Rules of Civil Procedure have worked out a careful scheme by which defendants may waive their right to jury trial: jury trial is waived if no party has demanded a jury once ten days have passed from the finding of the final pleading. Rule 38, F.R.Civ. P.[6] At the time of the March 25 Conference, Kline still had not filed his answer.[7] Accordingly, he was entitled to demand a jury trial unless he himself had wiaved the right or his attorney

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[6] Rule 38 provides:

. . . .

(b) Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue. Such demand may be indorsed upon a pleading of the party.

. . . .

(d) The failure of a party to serve a demand as required by this rule and to file it as required by Rule 5(d) constitutes a waiver by him of trial by jury. A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties.

[7] On February 20, 1970, well before the answer was due on March 4, 1970, Kline had moved to dismiss the complaint. Judge Timbers did not file his ruling on this till March 18. Accordingly Kline's answer was not due till March 28, Rule 12(a) F.R.Civ.P. Meanwhile, on March 25, the court had extended Kline's time to file until April 2, 1970.

had waived the right after being authorized by Kline to do so. It is clear that no such waiver occurred.

Though Judge Timbers had noted in passing that this was a "non jury trial," the attorneys did not affirmatively agree to this suggestion and they may well have understood it to refer only to the hearing on the preliminary injunction. Moreover, Kline was in Florida, as he had been during most of the preliminary stages of the case, and not in the judge's chambers, when Judge Timbers made his statement. Kline's only appearance prior to April 27 was at the March 3 hearing. Thus his attorney's failure to object to the judge's statement was done without Kline's knowledge, and in a setting where it was not unreasonable to believe that all that the judge would pass upon was the demand for a preliminary injunction.

The right to jury trial is too important, see **Ross v. Bernhard,** 396 U.S. 531 (1970); **Dairy Queen, Inc. v. Wood,** 369 U.S. 469 (1962); **Beacon Theatres, Inc. v. Westover** 359 U.S. 500 (1959); and Lumbard, Trial by Jury and Speedy Justice, Wash. & Lee L. Rev. 309, 311-13 (1971), and the usual procedure for waiver of the right too clearly set out by the Civil Rules for courts to find a knowing and voluntary relinquishment of the right in a doubtful situation. The failure of Kline's counsel to respond to an offhand remark by Judge Timbers during the scheduling of a hearing for a preliminary injunction when Kline had yet to file his answer, and there was still time before a jury demand had to be made, cannot fairly be construed to evidence any intent to waive Kline's right to

jury trial.[8] We would fail to recognize the important place of the civil jury in the pantheon of our liberties were we to hold its use so easily lost. Waiver, prior to the time for demanding jury trial has begun, should be based on nothing less than an affirmative representation by the party himself, or by his duly authorized counsel, on representation to the court that the matter has been discussed with the client and that the client has determined not to exercise his right to jury trial. In the absence of such affirmative action by Kline or his attorney, and in view of Kline's timely filed demand, we hold that it was error for the district judge to deny Kline a jury trial on the contract issues.

Moreover, as Kline had yet to file his answer and counterclaims, the nature of all the issues in the case could not have been known at the time of the March 25 conference. Kline was entitled to a jury trial on his counterclaim which alleged that Mrs. Heyman had breached the employment contract by discharging him without cause. See **Beacon Theatres, Inc. v. Westover,** 359 U.S. 500 (1959).

We note that the district judge evidently thought that "if you are talking about Rule 65 proceedings, you are talking about equitable proceedings," and therefore there is no right to jury trial. But though

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[8] Accord, **Bruce v. Bohanson,** 436 F.2d 733 (10th Cir. 1970), cert. denied 403 U.S. 918 (1971). See **Beacon Theatres, Inc. v. Westover,** 359 U.S. 500, 510 (1959) (Trial court's discretion to try equitable issue just to the court must be "very narrowly limited and must, wherever possible, be exercised to preserve jury trial").

Rule (65a) (2) does deal with the consolidation of a hearing for a preliminary injunction with trial on the merits, the rule specifically states "This subdivision (a) (2) shall be so construed and applied as to save the parties any rights they may have to trial by jury." Agreement to a consolidation of trial on the merits with a hearing for a preliminary injunction by itself in no way amounts to a waiver of the right to jury trial.[9]

We must consider, then, to what extent the district court's determinations here are infected by its erroneous denial of a jury trial. The constitutional guarantee of jury trial extends, of course, only to claims for legal relief; equitable claims are properly tried only to a judge. It is now fundamental, though, that when legal and equitable claims are tried together, common questions of fact must be decided by the jury in order to preserve the integrity of the seventh amendment guarantee. **E.g., Beacon Theatres, Inc. v. Westover,** 359 U.S. 500, 510-11 (1959); **Dairy Queen, Inc. v. Wood,** 369 U.S. 469, 472-73 (1962). The Court's concern in these cases has been the res judicata or collateral estoppel effect of a prior determination of an equitable claim upon questions common to a legal claim.

On this appeal, however, Mrs. Heyman has specifically stated that in the event this court finds error in the district court's denial of Kline's demand for a

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[9] Of course, had the district court honored the demand, it is more likely that the court would first have heard the application for preliminary relief and would then have set the jury issues for a trial at some later time.

jury trial, she agrees to waive all collateral estoppel effect of the district Judge's determination of the equitable claims with respect to the legal claims which must be retried. Thus, we might remand only the legal claims, letting the equitable claims stand. **De novo** consideration of all relevant facts on the legal claims could then be had and no infringement upon the seventh amendment guarantee arguably would result from permitting the determination of the equitable claims to stand. While such reasoning is perhaps constitutionally sound, we nevertheless consider appellees' waiver inadequate to permit us to remand only the legal claims under the employment contracts.

In waiving the collateral estoppel effect of the determination of the equitable claims, Mrs. Heyman can dispose of only her own interest. But among other things, the doctrine of collateral estoppel rests "firmly on the need to avoid conflicting adjudications (involving the same parties). . . . If possible, the same parties should not be subject to conflicting determinations on the same point, both of which are binding." **Armstrong v. United States**, 354 F.2d 274, 290-91 (Ct. Cl. 1965). See also **Technograph Circuits, Ltd. v. United States**, 372 F.2d 969, 977 (Ct. Cl. 1967). In this respect, Kline has a substantial interest in the collateral estoppel effect of the determination of the equitable claims under the employment contracts; yet he has not entered any waiver. And even putting aside whatever interest Kline may have, this court, in furtherance of its responsibility to preserve the integrity of the judicial process, has a substantial concern in the consistent determination of any particular question. Were we to remand only

the legal claims under the employment contracts, we would create a situation ripe with the possibility of inconsistent determinations of the same question. Consequently, we conclude that all claims and counterclaims—both legal and equitable—arising out of the employment contracts must be remanded for retrial.

Upon retrial, the jury's verdict will control whether Mrs. Heyman is entitled to any equitable and declaratory relief. The declaratory relief requested—that Kline has no interest in the Tampa parcel—is much like the equitable remedies of cancellation and recision and its disposition by the court will largely depend on the jury's determination of whether Kline had breached his employment contracts.[10] As for Kline's claims under his employment contract with Mrs. Heyman, his equitable counterclaims too will have to await the jury's determination of whether he breached his contract; his counterclaim for damages will be directly passed upon by the jury.

Kline's counterclaim under the July 16 assignment of the option in the Tampa land need not be retried. Kline sought only equitable relief with respect to the July 16 assignment. It does not appear that any of the issues with respect to the assignment of the option are also relevant to the employment contracts. Moreover, the issue upon which the district judge disposed of the validity of the assignment—the absence

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[10] Under Connecticut law, breach of contract warrants the cancellation of Kline's interest in the land. **Benassi v. Harris**, 147 Conn. 451, 162 A.2d 521 (1960); **Caramini v. Tegulias**, 121 Conn. 548, 186 A. 482 (1936).

of legal delivery—is clearly unique to the assignment and, given the solely equitable nature of the relief sought under the July 16 assignment, would have been for the judge to decide even if a jury trial had been accorded Kline as he requested. Affirming the district court's decision as to the invalidity of the July 16 assignment will not infringe on Kline's seventh amendment rights. Nor is their any potential for inconsistent determinations. As for the merits, we see no basis for disagreeing with the district court's determination that a legally effective delivery of the July 16 assignment of the option had never been made. For these reasons, we hold that the district court's finding that the July 16 assignment was not effective, and that Kline never obtained any interest in the Tampa land therefrom is the law of the case.

The district court held Kline and his attorneys in civil contempt for violating the TRO of February 12, 1970 forbidding them to institute proceedings with respect to the Florida land in any other court. In our view, the injunction was erroneously issued, see **infra**, and since, unlike convictions for criminal contempt, judgments of civil contempt fall when the order underlying them is vacated, the civil contempt must be reversed. **United States v. United Mine Workers of America**, 330 U.S. 258, 294-95 (1947); **Cliett v. Hammonds**, 305 F.2d 565, 570 (5th Cir. 1962).

Federal courts and state courts are courts of overlapping jurisdiction and, generally, one will not enjoin proceedings in another. **Kline v. Burke Construction Co.**, 260 U.S. 226 (1922). A recognized exception is when one court, adjudicating an **in rem** pro-

ceeding in which it must assert control over the **res** in order to have jurisdiction, enjoins another court seeking control over the same **res.** 28 U.S.C. §2283; see **Penn General Casualty Co. v. Pennsylvania ex rel. Schnader,** 294 U.S. 189 (1935). Here, however, the federal court proceeding was **in personam** and its jurisdiction was based on the diversity of citizenship of the parties, not on its control of the **res**—the 73-acre tract of land in Tampa, Florida. Since the court did not need to issue the TRO to protect its jurisdiction, see **United States v. Klein,** 303 U.S. 276 (1938), the TRO should not have issued and the contempt findings based up on it must be vacated.

Affirmed as to the ineffectiveness of the July 16, 1968, assignment of the option in the Tampa, Florida land. Reversed as to all legal and equitable claims and counterclaims based on the employment contracts, and reversed as to the finding of contempt against Kline and his attorneys.

ORDER OF UNITED STATES COURT OF APPEALS FOR SECOND CIRCUIT DATED MARCH 3, 1972 AMENDED EARLIER OPINION

UNITED STATES COURT OF APPEALS
For The Second Circuit

Nos.1057-1060—September Term, 1970.

(Petition for Rehearing—Filed January 14, 1972
Decided March 2, 1972.)

Docket Nos. 35418-9, 35625-6

ANNETTE HEYMAN, Individually; ANNETTE HEYMAN, as Executrix of the Estate of Lazarus S. Heyman, Late of Danbury; and PRUDENTIAL MANAGEMENT COMPANY, a Connecticut corporation,

Plaintiffs-Appellees,

—v.—

ROBERT S. KLINE, JOHN B. RUSH and HARVEY B. OSHINS,

Defendants-Appellants.

A petition for a rehearing having been filed herein by counsel for the appellants, and a brief in opposition thereto having been filed by appellees,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is Granted, and it is further

Ordered that the opinion in **Heyman v. Kline**, Docket Nos. 35418-9, 35625-6, decided January 3, 1972, be amended as follows:

Last paragraph of the headnote, changed to read "Reversed."

P. 5429, lines 7-15, changed to read:

"We hold that Kline was improperly denied a jury trial on the questions of whether he had breached his employment contracts and whether he was entitled to punitive damages as a result

of Mrs. Heyman's alleged breach of her fiduciary relationship with him. The judgment that Kline had no interest in the Tampa real estate also is reversed inasmuch as its determination will depend upon questions first passed upon by the jury."

P. 5430, lines 19-22, changed to read:

"Both Mrs. Heyman and Samuel testified that the assignment was never delivered to Kline, but that he found it going through office files. Kline testified that Samuel gave him a copy of the assignment when he returned from a business trip. Judge Timbers accepted the Heymans' version of the events and found that requisite legal delivery of the assignment had never in fact been made and thus that the assignment was ineffective."

P. 5431, delete lines 17-21 from "With" to "ineffective."

P. 5435, lines 7-12, changed to read

"Specifically, he sought damages for breach of his employment contract with Annette Heyman, punitive damages for her breaching the contract and excluding Kline from an interest in the Tampa land and, on the basis of the employment contracts and the July 16 assignment, various forms of equitable relief with a view to establishing his interest in the Tampa land."

P. 5438, line 10, changed to read

"contract by discharging him without cause as well as on his claim for punitive damages. See

Beacon" P. 5440, line 5, delete "under the employment contracts"

P. 5440, line 9, delete "arising out of the employment contracts"

P. 5440, line 16, change to "the court will depend in part on the jury's determination of whether Kline breached his employment contracts and in part on the jury's determination of whether the July 16 assignment was effective"

P. 5440-41, delete the paragraph beginning

"Kline's counterclaim" and ending "the law of the case."

P. 5442, lines 5-10, changed to "Reversed."

HENRY J. FRIENDLY, Chief Judge

J. EDWARD LUMBARD, Circuit Judge

JAMES L. OAKES, Circuit Judge dissents with opinion

OAKES, Circuit Judge (dissenting):

I would adhere to the decision of the court before rehearing, slip op. 5427, 5440-41, in holding that Kline's counterclaim under the July 16 assignment of the option on the Tampa land need not be retried. As the court originally pointed out, Kline sought only equitable relief with respect to the July 16 assignment and the issue upon which the district judge disposed of the issue of validity of the assignment—the absence of legal delivery—is "clearly unique" to that issue. There is no reason why this issue could not properly be severed under Rule 42(b), Fed. R. Civ.

P. On the merits there is no basis for disagreeing with the district court's determination that a legally effective delivery of the option had never been made. In my view, the district judge's finding to this effect is and should be the law of the case. Therefore, to so much of the opinion as would now permit the assignment issue to go to the jury, on remand, I dissent.

EXCERPTS FROM DISTRICT JUDGE'S GRANTING OF PLAINTIFFS' MOTION TO STRIKE JURY TRIAL CLAIM

THE COURT: Well, Mr. Rush, I want to hear you fully. But I might just as well be frank with you to say that there was never the slightest scintilla of a suggestion by counsel on either side or any party or the Judge, at any time, that a jury trial was anticipated in this case. And it is more than just words that appear in the transcript, even though I think those are consistent with what I say.

But I assume you are familiar with the proceedings that led up to that conference on March 25th in chambers which, incidentally, was solely because of some transportation difficulties in respect to the defendant and his lawyer getting here from Florida.

But as I recall, this matter of the plaintiffs' motion to hold the defendant and his lawyer in contempt had been on my calendar repeatedly and had been adjourned at the request of the defendant repeatedly, and I had gone along with that as an accommodation to him.

The same thing applied to plaintiffs' motion for a preliminary injunction.

And when we got together on March 25, the sole question was when would counsel on both sides be ready to go forward with the then pending matters, including a consolidation of the hearing on preliminary injunction with the trial on the merits under Rule 65(a)(2), I believe it is.

Now, if there had been any basis whatsoever for claiming a jury trial, it seems to me then and there was the time to say so. If you are talking about Rule 65 you are talking about equitable proceedings.

And just one other thing and I will let you complete your argument, because that is the purpose here; but I must say I would be misleading you, I think, and less than candid if I didn't say that you've got an uphill approach here to convince me that there has been not only a technical waiver — I wouldn't put it on that ground at all — but a complete understanding, waiver of any claimed jury trial, and a judicial action in reliance thereon. And I can't emphasize that too much.

We have an emergency situation in this District that I think you are aware of. The very fact that the Chief Judge of the Court of Appeals is here in the building today in preparation for his assignment, which he has undertaken a week from today, coupled with the bringing of another judge — who is in poor health — from a long distance away to sit here in Bridgeport a week from today — all had to do with my agreement to take this case out of order, pre-

ferred over every case on the docket, civil and criminal, and hear it.

Now if there had been any suggestion of a right to jury trial, obviously neither side would have been entitled to have the case preferred over some 800 jury cases, civil cases on the docket.

So there is more than just a surface or technical waiver. It seems to me, if you search the entire proceedings from beginning to end here, there was — to me anyway — a clear and unequivocal agreement to try this case to the Court without a jury as to all issues.

Having said that, I will hear you fully, as is your right.

THE COURT: Well, in view of the iminence of this case for trial, that is, a week from today, to which everybody agreed at the time of the conference almost a month ago, that is, on March 25, I am going to rule now on this motion. **And the Court's order is as follows:**

The plaintiffs' motion to strike the defendant's demand for jury trial is granted, based upon the entire record herein, including judicial action in reliance thereon.

Now when and if I have an opportunity to prepare an appropriate memorandum of decision I will do so. But I think in fairness counsel should know a week in advance that we are going forward with the trial of this case as scheduled, a week from today.

TRIAL COURT MEMORANDUM OF DECISION AFTER TRIAL

MEMORANDUM OF DECISION AFTER TRIAL

In this diversity action commenced in this Court on February 12, 1970 by the filing of a verified complaint, plaintiffs seek declaratory and injunctive relief plus damages arising out of defendant's alleged breach of his employment contracts with plaintiffs and defendant's various alleged tortious acts which are claimed to have been injurious to plaintiffs. Specifically, plaintiffs seek (i) a declaratory judgment that defendant

has no right, title or interest in certain real property in Tampa, Florida; (ii) preliminary and permanent injunctions enjoining defendant from interfering with plaintiff's ownership and development of the Tampa property; (iii) damages; and (iv) other relief, including reasonable expenses incurred by plaintiffs as a result of acts of alleged civil contempt committed by defendant and his counsel in violating this Court's temporary restraining order of February 12, 1970.

Defendant's verified answer filed March 31, 1970 denies the material allegations of the complaint; alleges certain affirmative defenses; and asserts a counterclaim seeking to establish defendant's interest in the Tampa property and claiming damages.

For the reasons stated below, the Court holds that plaintiffs are entitled to the injunctive relief sought by them, and that defendant's counterclaim must be dismissed.

JURISDICTION

Jurisdiction is founded upon diversity of citizenship and requisite jurisdictional amount. 28 U.S.C. §1332 (a)(1) (1964).

Plaintiff Annette Heyman is a Connecticut citizen residing in Danbury; she sues individually and as executrix of the estate of her late husband, Lazarus S. Heyman, who died a resident of Danbury.

Plaintiff Prudential Management Company is a Con-

necticut corporation with its principal place of business in Danbury.

Defendant Robert S. Kline is a Florida citizen residing at Largo, Florida.

The matter in controversy exceeds $10,000, exclusive of interest and costs.

The Court, in a memorandum of decision filed March 19, 1970,[1] denied defendant's motion to dismiss this action for lack of in personam jurisdiction over defendant, holding that defendant as Florida resident was amenable to service of process in Florida pursuant to Connecticut's long arm statute, Conn. P.A. No. 744 (Jan. 1969), *formerly* Conn. Gen. Stat. §52-59(a) (1958), and that service was properly made on defendant in Florida pursuant to Conn. P.A. No. 635 (Jan. 1969), *formerly* Conn. Gen. Stat. §52-59(a) (1958).

HEARINGS AND RECORD

Pursuant to agreement of the parties, the Court held an eight day consolidated hearing at Bridgeport, beginning April 27, 1970 and concluding May 7, 1970, on plaintiffs' and defendant's applications for preliminary

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[1] *Heyman* v. *Kline*, ____ F.Supp. ____ (D. Conn. 1970), Civil No. B-12, filed March 19, 1970.

injunctions, plaintiffs' contempt motion and trial on the merits. Rule 65(a)(2), Fed. R. Civ. P.

The record before the Court consists of the pleadings; facts established by stipulation and requests for admissions; answers to interrogatories; some 105 documentary exhibits; depositions read in evidence; and the trial testimony of 25 witnesses.

Counsel for the respective parties have been fully heard in oral argument; and they have submitted helpful briefs, together with proposed findings of fact and conclusions of law.

FINDINGS OF FACT

After trial and based upon the entire record, the Court makes the following findings of fact.

(A) *Chronological Sequence of Events*

(1) On February 15, 1968, Lazarus Heyman acquired on option (PX-13)[2] to purchase 73 acres of land in Tampa, Florida (the Tampa property). He paid $10,000 for the option which was exercisable within 120 days, i.e. by June 15, 1968.

(2) On March 31, 1968, after preliminary discussions, Kline entered into a one year written employ-

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[2]Plaintiffs' exhibits will be referred to as PX ____; defendant's exhibits as DX ____.

ment contract (PX-22; DX-B) with Lazarus Heyman to begin April 15, 1968. By the terms of this contract, Kline was to devote his full time exclusively to Heyman's business in connection with the acquisition and development of commercial and industrial real estate — particularly the leasing thereof — and Kline was to receive (a) a salary of $20,000 per annum, (b) a year end bonus to be determined at the discretion of Heyman on the basis of leases closed during the year, and (c) the right to invest such bonus payments in Heyman's real estate developments, to the extent of 15% of the equity thereof, subject to the agreement of Heyman's co-venturers and provided Kline indicated his intention to so invest at the inception of the deal. Kline was to open a small office in the Tampa area. His first order of business under this employment contract was the development of the Tampa property upon which Heyman recently had acquired an option.

(3) Lazarus Heyman died on May 22, 1968.

(4) His widow, Annette Heyman, was appointed executrix of his estate. She continued the real estate business of Lazarus Heyman.

(5) Lazarus Heyman was survived also by a daughter, Abigail Heyman, and by a son, Samuel J. Heyman.

(6) Samuel J. Heyman, a lawyer and former Assistant United States Attorney, assisted his mother, Annette Heyman, in the conduct of the family real estate business after the death of his father. At all

times here pertinent, he acted as agent of his mother; he also was an officer and stockholder of plaintiff Prudential Management Company.

(7) Shortly after the death of Lazarus Heyman, Samuel Heyman, acting on behalf of his mother, orally agreed with Kline that the latter's employment contract with Lazarus Heyman would continue, except that Kline would work in Danbury rather than Tampa.

(8) On June 15, 1968, Annette Heyman, as executrix, upon the payment of $5,000, obtained an extension to July 15, 1968 of the option to purchase the Tampa property (PX-14; DX-C); and on July 15, 1968, upon the payment of an additional $5,000, she obtained a further extension to August 15, 1968.

(9) On August 13, 1968, Annette Heyman, individually, exercised the option to purchase the Tampa property upon the payment of an additional $30,000 (PX-6). The closing took place on December 9, 1968. On February 1, 1969, Annette Heyman entered into a lease (PX-8) of the Tampa property to Tampa Mall, Inc., a subsidiary of Edward J. De Bartolo Company, by the terms of which the tenant is required to commence construction of a shopping center on the Tampa property by August 1, 1970.

(10) Between early July and the middle of August 1968, Samuel Heyman and Kline discussed Kline's continued employment by Annette Heyman. The upshot was an understanding, reached just prior to Samuel Heyman's departure on August 15 for two weeks of military reserve duty, that Kline would be given a

new one year employment contract; that his new salary would be $30,000 per annum; and that he would have the right to invest to the extent of 15% in the Tampa venture, subject to certain conditions specified below in paragraph 19.

(11) On September 9, 1968, Kline entered into a new one year written employment contract with Annette Heyman for the period from September 1, 1968 to August 31, 1969 (PX-21; DX-G). This contract superseded the earlier contract of March 31, 1968 between Kline and Lazarus Heyman. The new contract provided that Kline would devote his full time exclusively to the Heyman business, including the acquisition, sale, development and management of commercial and industrial real estate; that he would receive a salary of $30,000 per annum, the use of a leased car, plus reimbursement of reasonable, necessary and ordinary business expenses incurred pursuant to his employment; that he would have the right to invest his own money in his employer's real estate ventures, to the extent of 15% of the equity thereof; and that his 15% participation in the Tampa venture was subject to certain conditions specified below in paragraph 19. Kline was to perform his duties under the new contract at the Heyman office in Danbury and was to take up residence in the Danbury area.

(12) On January 17, 1969, Samuel Heyman, acting for his mother, discharged Kline for cause. See paragraphs 23 and 24 below.

(B) *July 16, 1968 Assignment of Option*

(13) On July 16, 1968. Annette Heyman executed a simple form of assignment of the option agreement (DX-D) with respect to the Tampa property, under the following circumstances.

(a) Prior to July 16, tax counsel had advised the Heymans that the option to purchase the Tampa property should not be exercised by Annette Heyman as executrix of the estate of Lazarus Heyman.

(b) Samuel Heyman accordingly requested Attorney Albert H. Hornig, whose office was in the same building as the Heyman office in Danbury, to prepare a simple form of assignment so that the option would be held, not by the estate, but by four individuals; Annette Heyman, individually (29%), Samuel Heyman (28%), Abigail Heyman (28%), and Kline (15%). The total consideration was recited to be $20,000, payable to the estate within 30 days.

(c) Attorney Hornig prepared the assignment as requested and it was executed by Annette Heyman on July 16.

(d) Only the ribbon copy of the assignment was executed. It was given to Samuel Heyman who placed it in his own files. Neither the original nor a copy of the assignment was ever delivered to Kline or to anyone else.

(e) Thereafter, real estate counsel advised Samuel Heyman that the option to purchase the Tampa

property should be exercised by Annette Heyman alone, as she did on August 13, 1968 (PX-6).

(f) At no time did Samuel Heyman or Annette Heyman intend to make the July 16 assignment an effective document; they specifically decided it was not to be used and was not to become effective.

(14) During the latter part of August 1968, while Samuel Heyman was on military reserve duty and away from Danbury, Kline discovered the original assignment of the option, made a Xerox copy of it and sent it to Attorney Rubin H. Marcus, the Heyman real estate counsel in New York City, on August 21 (PX-28B).

(15) On August 23, Attorney Marcus wrote to Kline advising that the option assignment which Kline had sent to Marcus on August 21 should not be used; that this form of assignment would require that all four individuals be named in the deed from the sellers and all four would have to execute the mortgage; and that Annette Heyman as executrix should simply convey the option to herself.

(16) On August 26, Kline replied to Attorney Marcus' letter of August 23, stating, "Please draw up what ever you think would be best in the form you want and send it on to me." (PX-28D).

(17) On September 16, 1969 — thirteen months after Annette Heyman individually had exercised the option to purchase the Tampa property (PX-6) and eight months after Kline was discharged by the Heymans

for cause — Kline recorded his Xerox copy of the July 16, 1968 assignment of option on the land records of Hillsborough County, Florida.

(C) *Nature of Kline's 15% Interest In Tampa Property*

(18) Kline's 15% participation interest in the Tampa venture, acknowledged in the employment contract Kline entered into with Annette Heyman on September 9, 1968 (PX-21; DX-G), was subject to certain specific conditions agreed to between Kline and Samuel Heyman, acting for his mother, as the upshot of their discussions during the period from early July to the middle of August 1968. See paragraphs (10) and (11) above.

(19) Specifically, it was orally agreed that, in return for Kline's investment to the extent of 15% in the Tampa venture, Kline would be

(a) entitled to receive 15% of the profits of the venture, including rents and gains in the event of sale;

(b) obliged to contribute 15% of the cost and expenses of the venture;

(c) limited in his right to sell his interest in the Tampa property by being required to give the Heymans the right of first refusal;

(d) precluded from all decision making with respect to the venture; and

(e) committed to have reduced to writing at a future date the nature of his rights with respect to the Tampa property.

(20) After this oral understanding was reached — just before Samuel Heyman departed on August 15 for two weeks of military reserve duty — Kline delivered to the Heyman office in Danbury checks drawn by him as follows:

(a) Check dated July 21, 1968, but deposited August 15, 1968, to the order of Annette Heyman in amount of $3,000, representing Kline's 15% share of the $20,000 paid by the Heymans for acquisition and extension of the option (DX-E).

(b) Check dated August 9, 1968, but deposited September 6, 1968, to the order of Annette Heyman in amount of $4,500, representing Kline's 15% share of the $30,000 paid by the Heymans to exercise the option (DX-F).

(21) After the closing on December 9, 1968, at which time Annette Heyman paid an additional $22,575.25. to purchase the Tampa property upon which she had exercised the option, Kline delivered to the Heymans a check dated December 23, 1968 in amount of $6,091.62 (DX-I) representing Kline's 15% share of the closing price ($22,575.25) plus the 1968 real estate taxes

($18,035.36), for which he had been billed on December 12, 1968 (DX-H).

(22) On September 11, 1969, Annette Heyman tendered to Kline (PX-5E) her check in amount of $13,591.62 to reimburse him for the total of his 15% share of payments made on account of the Tampa property ($3,000, $4500 and $6,091.62) while he was in the Heyman's employ. Kline returned the $13,591.62 check to Annette Heyman on September 17 (PX-5G).

(D) *Kline's Breach Of His Employment Contracts*

(23) Kline breached his obligations under his employment contracts with the Heymans in the following material respects.

(a) He deliberately and knowingly submitted fraudulent expense vouchers to his employers, duplicating expenses charged to his former employer, Shoe Corp. of America, duplicating expenses previously reimbursed by the Heymans, and claiming expenses for entertaining people, which expenses either were not incurred or, if incurred, were paid for by the person Kline claimed was his guest.

(b) He failed to perform his work in the best interests of his employers in that he antagonized tenants to the point where many of them refused to have any dealings with him.

(c) He asked a bank officer on one occasion to predate a letter recommending the Heymans to a Florida bank to make it appear that the letter was written prior to the death of Lazarus Heyman.

(d) He inspected the personal files of the Heymans, snooped through their tax returns and other financial information, and expressed to other employees his view that Lazarus Heyman had "put something over" on the Internal Revenue Service; and later, after his discharge, he threatened to report to the Internal Revenue Service his assertions of tax irregularities on the part of the Heymans unless they conveyed to him an interest in the Tampa property.

(e) He held himself out to third parties as a real estate broker, an activity that was not part of the Heymans' business.

(f) He endeavored to perform real estate services for persons other than his employers on at least two occasions.

(g) He accepted from a tenant of his employers clothing at a discount of one-third below the wholesale price; he also solicited this tenant to let him have additional clothing at the same discount or at no charge at all; and he thereafter recom-

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mended to his employers that this tenant receive a lease on more favorable terms than other tenants of the same building.

(h) He was insubordinate to his employers in failing to follow their instructions concerning work assignments, dealings with the employers' general contractor, and office practices; and he failed to respond to their inquiries concerning business matters.

(i) He deliberately set out to cause employees at the Heymans' Danbury office to resign; and he succeeded with respect to four of them, accomplishing his purpose by a campaign of personal abuse and overbearing domination.

(j) He repudiated his contractual obligations to his employers and declared himself not bound by them.

(k) He failed to perform his obligations satisfactorily in numerous respects, including the spending of inordinate amounts of time on personal matters and indulging in such practices as using the petty cash fund for his own lunches.

(E) *Kline's Excessive And Fraudulent Expenses*

(24) Kline incurred excessive and fraudulent ex-

penses and submitted fraudulent vouchers, of which the following are illustrative.

(a) He was reimbursed by Lazarus S. Heyman for a trip to Odessa, Texas (February 2-3, 1968) in amount of $84.15 (PX-25). His supporting voucher included $8.50 for motel, $15.49 for car rental, $50.61 for airline ticket, and $5.41 for telephone calls. With the supporting documents was a bill from the Ramada , Odessa, Texas, for a room charge of .50 and a charge for telephone calls in amount of $5.41. Also included in these documents was an airline ticket, although the portion of the ticket which indicated that it was purchased with a Shoe Corp. credit card appears to have been blocked out when the Xerox copy of the bill was made.

PX-36 is a Shoe Corp. expense voucher for the week ending February 3, 1968; it indicates that some of the same expenses reimbursed by Lazarus S. Heyman were reimbursed by the Shoe Corp. Kline was reimbursed for the same airline ticket in amount of $50.61. He was reimbursed for his hotel bill for the night of February 2nd in amount of $13.91, which included the same room charge of $8.50 and telephone charge of $5.41 that were billed to Lazarus S. Heyman. A copy of the same Ramada Inn bill was attached to PX-36. This exhibit

also indicates that Kline was reimbursed for auto rental in amount of $15.49.

(b) He was reimbursed by Lazarus S. Heyman for expenses incurred for the period February 10 to February 19, 1968 in amount of $235.24 (PX-25). The voucher submitted included a room charge for February 9th at Tampa, Florida in amount of $13.90. PX-35, a Shoe Corp. voucher, indicates that Kline was reimbursed by the Shoe Corp. for a hotel room for the night of February 9th in amount of $13.91. Attached to this voucher is a hotel bill from the Hawaiian Village Motel at Tampa, Florida.

(c) He submitted an expense voucher for the week ending April 26, 1968 in amount of $243.64. This voucher included two airline charges in amounts of $131.25 and $35.70. He later submitted an expense voucher for the week ending May 3, 1968 in amount of $328.54. This voucher included two airline charges previously reimbursed, together with several other items reimbursed on the previous voucher. In fact, practically the entire $243.64 previously reimbursed was claimed on the May 3rd voucher.

(d) He submitted an expense voucher for the week ending August 25, 1968 in amount of $217.81. This voucher indicates that on August 24th he travelled from Columbus,

Ohio, to Pennsylvania; that he stayed overnight in Pennsylvania on the 24th; and that he arrived in Danbury on the 25th. He billed $37.80 for a room in Pennsylvania on the 24th and $33.28 for a room in Danbury on the 25th. He testified that the August 25th charge in amount of $33.28 was for the Pennsylvania motel on the night of August 24th. However, as indicated above, he already had charged for the Pennsylvania motel in amount of $37.80. (Attached to the voucher is a receipt in amount of $18.95 for a Pennsylvania motel for August 24th. Presumably members of his family occupied another room, thereby accounting for the total of $37.80.) PX-25A indicates that plaintiffs paid the Stony Hill Inn and Motel directly for rooms beginning August 25th and ending August 30th, at a daily charge of $33.13.

He submitted a voucher for the period August 19-September 3 in amount of $384.44. This voucher repeats almost verbatim the expenses previously billed for the week ending August 25th, the exception being that no room charge is claimed on this voucher for August 25th. However, a room charge for August 30th in amount of $30.01 appears on this voucher, whereas the bill from the Stony Hill Inn and Motel indicates that plaintiffs paid this room charge directly. In addition, a charge on this voucher in amount of $10.57 for

September 3 was disallowed; and, according to the testimony of Samuel Heyman, Kline admitted this was a personal expense.

(e) He billed $6.15 for dinner with "H. Miller" on June 25, 1968. Ham Miller testified by deposition that he had no such dinner with Kline on that date or on any other date. No supporting receipt was submitted for this item.

(f) He billed $25.43 for dinner with Hy Goldfeld on July 31, 1968. Accompanying this voucher was a receipt indicating a charge incurred at the Water Wheel Inn, Ardsley, New York. Goldfeld testified that he did not have dinner with Kline on this date or any other date; and in fact he had never been to Ardsley, New York.

(g) He billed $29.78 for dinner with Wes and Bill Woodson on September 11, 1968. He submitted a receipt indicating a charge in this amount but dated September 12th instead of September 11th. Wes Woodson testified by deposition that he had dinner with Kline on September 11th, but that he paid for the dinner himself. Woodson's American Express receipt supports this testimony. Woodson testified that this was the only occasion on which he or his cousin, Bill Woodson, had had dinner with Kline.

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(h) He charged $8.39 for entertainment for Messrs. Meredith and Hamilton on August 7, 1968. Meredith testified by deposition that he had several drinks with Kline on this date, but that Meredith paid for the charges incurred. Kline did not submit a receipt substantiating this charge.

(i) He charged $4.35 for entertainment for Lee Colber on May 25, 1968. He submitted a Danbury hotel bill which indicated a $4.35 restaurant charge on May 25. Colber testified that he was not entertained by Kline in Danbury, and that the only time Kline might have paid for a meal for Colber was on a trip to Meridian on a later occasion.

(j) He submitted, in his expense voucher for the two weeks ending October 25, 1968, a charge in amount of $6.00 for dinner on October 7, 1968. The item is labeled "Dinner Re Topps". No supporting receipt was submitted. In his deposition, Kline testified that he took Samuel Heyman to dinner on this occasion. After Heyman testified that this was not so, Kline changed his story at the trial to indicate that he had dinner alone.

(k) He submitted a charge of $9.73 for June 11, 1968 for "Entertainment — R. Bush." He also submitted a supporting receipt for a charge at the Herdas Steak House, Clear-

water, Florida, having written the name R. Bush on the receipt. Ruth Bush testified by deposition that she had had dinner with Kline on only one occasion in her life, and that it was not at this restaurant.

(l) He submitted a voucher for the period May 21-May 25, 1968. The amount reimbursed in accordance with this voucher, together with other charges for this period billed directly, totalled $277.01. Included was a charge in amount of $10.50 for limousine service for Kline's wife. There was testimony at the trial that Kline and his wife were in Danbury at that time to attend Lazarus Heyman's funeral.

(m) A number of items claimed by Kline for reimbursement were disallowed in part because of his admission to Samuel Heyman that they represented personal expenses. Only $21.00 of the $31.61 claimed for gas for the week ending September 28, 1968 was paid; and only $15.00 of the $22.51 claimed for the week ending October 11, 1968 was paid. In addition, a claim was made by Kline for the week ending December 11, 1968 in amount of $201.30, of which only $116.81 was allowed. The trip covered by this voucher never should have been made in view of Samuel Heyman's instructions to Kline that the trip was to be taken only after Mr. Barnett had seen the DeLand, Florida property. Mr. Barn-

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ett's letter (PX-5B) states that he had not seen the property prior to Kline's visit.

(n) In Kline's voucher for the two weeks ending November 29, 1968, he charged $2.50 for entertaining Emanuel Dakis on November 25. Mr. Dakis testified that he met with Kline on this occasion, but that Dakis paid for any expenses incurred. Kline submitted no supporting receipt for this charge.

(F) *Contempt Of This Court's February 12, 1970 Temporary Restraining Order*

(25) On February 12, 1970, upon presentation of plaintiffs' verified complaint and application for a temporary restraining order Rule 65, Fed. R. Civ. P., this Court issued its temporary restraining order at 4:00 P.M. It was filed at 4:08 P.M.

(26) On February 12, 1970 at 11:30 P.M., personal service of the temporary restraining order and other process was made upon defendant, Robert S. Kline, at his home in Largo, Florida, by a process server, Albert A. Estes, Sr., pursuant to this Court's order.

(27) The temporary restraining order specifically enjoined Kline, his attorneys and others acting in concert with Kline, from initiating any legal proceedings, filing any documents on land records or making any assertions to any financial institutions, Tampa Mall,

Inc., or any other persons, in which Kline claimed any right, title or interest in the Tampa property specifically described in the complaint and in the temporary restraining order.

(28) On February 13, 1970, Kline, through his attorney, John R. Bush, Esq., of Tampa, Florida, in direct defiance of the temporary restraining order of this Court and in violation thereof, caused a *lis pendens* to be filed on the land records of Hillsborough County, Florida, applicable to the Tampa property, which was the very same property that this Court's temporary restraining order entered the previous day had enjoined Kline and his attorneys from encumbering.

(29) Attorney Bush, as well as Kline, had seen the temporary restraining order and were aware of all of its provisions *prior* to the filing of the *lis pendens* on February 13, 1970, as well as *prior* to initiating the lawsuit referred to in paragraph (30) below.

(30) On either February 13, or 18, 1970, Kline, through Attorney Bush, also in direct defiance of the temporary restraining order of this Court and in violation thereof, initiated a lawsuit against plaintiff, Annette Heyman, by filing a complaint in, and causing a summons to be issued by, the Circuit Court of the Thirteenth Judicial Circuit, Hillsborough County, Florida, alleging that Kline claimed an interest in the Tampa property, which was the very same property that this Court's temporary restraining order of Feb-

ruary 12, 1970 had enjoined Kline and his attorneys from claiming an interest in.

(31) Attorney Bush, as well as another of Kline's attorneys, Harvey B. Oshins, Esq., of White Plains, N.Y., both fully aware of the provisions of this Court's temporary restraining order of February 12, 1970, nevertheless advised Kline to take the action referred to in paragraphs (28) and (30) above.

(32) Plaintiffs filed in this Court on February 24, 1970 a motion that Kline, Attorney Bush and Attorney Oshins be adjudged in civil contempt of this Court and that plaintiffs, *inter alia,* be awarded compensatory damages to reimburse them for expenses incurred by them as a result of the acts of civil contempt committed by Kline and his attorneys in violation of this Court's temporary restraining order of February 12, 1970. Plaintiffs' contempt motion was continued from time to time at defendant's request. An evidentiary hearing thereon was held on April 27, 1970.

(33) The *lis pendens* and the Florida lawsuit, referred to in paragraphs (28) and (30) above, were withdrawn by Kline and his attorneys on March 24, 1970 — after they had been pending for approximately five weeks and approximately one month after Attorney Bush conceded he became aware of the amended Connecticut long arm statute which authorized service of process upon a non-resident, as it was made upon Kline in the instant case.

(34) In the meantime, plaintiffs and their counsel

incurred certain counsel fees and expenses necessitated by the instant contempt proceedings and the preparation of proceedings to remove to the Florida federal court the Florida state court action referred to in paragraphs (28) and (30) above. I find that the following counsel fees and expenses are fair and reasonable in amount and that the same necessarily were incurred in connection with said proceedings as a direct result of the contempt of this Court's temporary restraining order of February 12, 1970 by Kline and his attorneys:

(a) Counsel fees of plaintiffs' Florida counsel (Messrs. Carlton, Fields, Ward, Emmanuel, Smith & Cutler, of Tampa, Florida)	$1,500.00
(b) Counsel fees of plaintiffs' Connecticut counsel (Messrs. Goldstein & Peck, of Bridgeport, Connecticut)	1,159.00
(c) Expenses of Samuel J. Heyman in traveling to Florida	200.00
(d) Expenses of witness Albert A. Estes, Sr., of Saminole, Florida, in traveling to Connecticut	335.57
Total	$ 3,194.57

(35) Defendant, Robert S. Kline, and his attorneys,

John R. Bush, Esq., and Harvey B. Oshins, Esq., are guilty of civil contempt of this Court.

(36) As a consequence of said contempt, plaintiffs are entitled to recover against said Robert S. Kline, John R. Bush, Esq., and Harvey B. Oshins, Esq., the sum of $3,194.57, representing reasonable expenses incurred by plaintiffs as a result of said contempt.

CONCLUSIONS OF LAW

(1) The Court has jurisdiction over the subject matter and the parties.

(2) The pleadings present a justiciable controversy between the parties.

(3) Defendant's right to invest and participate in the Tampa property was conditioned upon his faithful performance of his contractual employment obligations to plaintiffs.

(4) Defendant breached his contractual employment obligations to plaintiffs in material respects.

(5) Plaintiffs are entitled to a decree that defendant has no right, title or interest in the Tampa property.

(6) The assignment of the option executed by Annette Heyman on July 16, 1968 never was delivered to defendant and never became effective.

(7) Plaintiffs are not obligated to pay defendant

any further compensation, commissions or other benefits.

(8) Plaintiffs are entitled to recover reasonable damages from defendant (to be determined as provided at page 44 below).

(9) Plaintiffs are entitled to preliminary and permanent injunctions.

(10) Plaintiffs are entitled to recover from defendant and his attorneys, John R. Bush, Esq., and Harvey B. Oshins, Esq., the reasonable expenses incurred by plaintiffs as a result of the acts of civil contempt committed by defendant and his attorneys in violating this Court's temporary restraining order of February 12, 1970.

(11) Plaintiffs are entitled to judgment dismissing defendant's counterclaim.

(12) Defendant is not entitled to a temporary restraining order or a preliminary injunction.

OPINION

I.

The critical threshold issue is whether Kline's claimed right to invest and participate in the Tampa property was conditioned upon his faithful performance of his contractual employment obligations to plaintiffs. I hold that it clearly was.

Kline's contract with plaintiffs was not a divisible one; plainly it was the intention of the parties and the object of the contract that Kline's right to in-including the Tampa property, depended for its consideration upon Kline's obligation of faithful performance of his employment engagements.

> " 'The divisibility of the contract does not alone depend upon the multiplicity or the separability of the items therein, but upon the intention of the parties and the object of the contract. If it was the intention of the parties to treat the contract as an entire contract, and it appears that their engagements would not have been entered into except upon the clear understanding that the full object of the contract should be performed, it is not a divisible contract. . . .' " 6 Williston, Contracts §862, at 271 (3d ed. Jaeger, 1962), quoting from *Stern v. Sunset Road Oil Co.*, 47 Cal. App. 334, 340, 190 P. 651 (1920).

The Heymans extended to Kline a right to a 15% participation in the Tampa property only on condition that he would faithfully perform his employment obligations. Kline agreed to perform his employment obligations only on condition that he would have a right to a 15% participation in the Tampa property. The right to invest and participate was a vital and necessary part of the consideration for Kline's promise faithfully to perform employment services. This relationship between the right to invest and the duty to perform employment obligations was a basic part of

the written employment contracts of March 31, 1968 and September 9, 1968 and of the interim oral agreement reached between Kline and Samuel Heyman after the death of Lazarus Heyman.

The parties' conceptual "right to invest — duty to perform employment obligations" had its geneis in Kline's written contract with Lazarus Heyman of March 31, 1968 which obligated Kline to perform for one year. Its fifth paragraph provided for a discretionary bonus to be paid "[a]t the end of each year of said employment." The sixth paragraph expressed the intention of Lazarus Heyman to permit Kline to invest "any sums which may become due to you under the terms of the foregoing paragraph." Plainly the intention of the parties at the outset was not that Kline should be granted a right to invest unrelated to his employment obligations; rather, it was specifically intended that he be permitted to invest only those sums he might receive as a bonus after a year of faithful performance. Obviously the failure to perform faithfully would preclude the right to invest.

After the death of Lazarus Heyman on May 22, 1968, discussions between Kline and Samuel Heyman established an interim oral agreement of employment and led to the signing of a second written employment contract. The oral agreement continued in effect the first written employment contract, except that Kline's place of employment was changed from Tampa to Danbury. The discussions ultimately gave more precise content to the nature of the rights Kline would acquire by his 15% investment; and, responding to his de-

mand, it was agreed that he would receive a 50% salary increase, from $20,000 to $30,000 per annum. The oral agreement which emerged from these discussions was reached prior to Samuel Heyman's departure in mid-August for two weeks of military reserve duty.

Kline's second written employment contract, entered into with Annette Heyman on September 9, 1968, refers to Kline's right to invest as being "in addition to your remuneration." The obvious interpretation of these words, in the context of the entire contract and all that preceded it, is that the right to invest stands, not separate from and unrelated to remuneration, but as something extra — given for precisely the same consideration as remuneration is given, namely, the obligation of faithful performance.

During the period of the second written contract, as well as during the period of the interim oral agreement, the evidence is clear that the parties intended Kline's right to invest and his obligation to perform to be reciprocal and dependent upon each other. The Heymans were not endeavoring to raise capital for their Tampa venture. Their testimony is unequivocal that they never sought partners or investors on any basis for this venture. They were willing to let Kline invest solely because he was an employee from whom they expected a year of faithful service. From their standpoint, he never would have received a right to invest had he not been an employee. From his standpoint, he never would have agreed to perform his employment obligations had he failed to receive a right to invest. Indeed, Kline testified that during the

interim period between the written agreements he was not certain whether he would remain in the employ of the Heymans on any basis.

Upon the entire record, I hold that Kline's claimed right to invest and particpate in the Tampa property was conditioned upon his faithful performance of his contractual employment obligations to plaintiffs.

II.

Moreover, the record establishes by an overwhelming preponderance of the credible evidence that Kline breached his contractual employment obligations to plaintiffs in numerous material respects.

A large portion of the trial testimony and many documentary exhibits demonstrate Kline's failure faithfully to perform his employment obligations. See findings (23) and (24) above. Briefly, his breaches included the following: he submitted fraudulent expense vouchers; he failed to perform work in the best interests of his employers, including antagonizing tenants; he caused other employees to resign; he solicited and accepted a kick-back from a tenant in return for a favorable lease; he failed to work exclusively for his employers, attempting to perform real estate services for others and holding himself out to others as a real estate broker (which he was not); he was guilty of gross insubordination to his employers, refusing to carry out assignments as directed and failing to respond to their inquiries concerning their properties; he re-

pudiated his contract with his employers, declaring it was not worth the paper it was printed on; and, after snooping through his employers' private financial papers and tax returns, he expressed to other employees his belief that Lazarus Heyman had "put something over" on the Internal Revenue Service, and later threatened to report Annette and Samuel Heyman to the tax authorities if they did not convey to him an interest in the Tampa property.

Any one of the foregoing acts or omissions on the part of Kline alone would have justified his discharge; together they compelled it.

Among the well established grounds for discharge of an employee are dishonesty, 3A Corbin, Contracts §680 (1960); padding expense accounts, *Hutchinson* v. *Washburn*, 80 App. Div. 367, 80 N.Y.S. 691, 692 (2nd Dept. 1903); charging personal expenses to employer, *Graves* v. *Kaltenbach & Stephens, Inc.*, 205 App. Div. 110, 111, 199 N.Y.S. 248, 249 (1st Dept. 1923), *aff'd*, 237 N.Y. 546, 143 N.E. 737 (1923); making secret examination of employer's records, *Allen* v. *Aylesworth*, 58 N.J.Eq. 349, 351-53, 44 A. 178, 179 (1899); accepting gifts from customers, *Wade* v. *Barr Dry Goods Co.*, 155 Mo. App. 405, 410-12, 134 S.W. 1084, 1086 (1911); doing business on behalf of third parties, *Merrimac Mfg. Co.* v. *Bibb*, 124 Ark. 189, 191-92, 186 S.W. 117 (1916); and generally any conduct adverse to the employer's interests and such as to cause the employer to lose confidence in his employee, 35 Am. Jur. *Master and Servant* §§40-49 (1959).

An employer may take into account an employee's entire course of conduct in deciding to discharge him, *Gordon* v. *Dickinson,* 100 W.Va. 490, 497-98, 130 S.E. 650, 652-53 (1925); and even if some infractions have been condoned, that is deemed to be on condition that the employee's future conduct will be proper. 35 Am. Jur. *Master and Servant* §50 (1959).

An employer's motive in discharging an employee is irrelevant. *In Re Nagel,* 278 Fed. 105, 109 (2 Cir. 1921). And an employer may justify a discharge on the basis of facts learned after the discharge with respect to the employee's misconduct. *Bright* v. *Ganas,* 171 Md. 493, 504-05, 189 A. 427, 431-32, 109 A.L.R. 467 (1937); *Graves* v. *Kaltenbach & Stephens, Inc., supra; Hutchinson* v. *Washburn, supra; Von Heyne* v. *Tompkins,* 89 Minn. 77, 82-83, 93 N.W. 901, 906-07 (1903); *Allen* v. *Aylesworth, supra;* 35 Am. Jur. *Master and Servant* §37 (1959).

I hold that Kline breached his contractual employment obligations to plaintiffs in material respects.

III.

The Court having held that Kline's claimed right to invest and participate in the Tampa property was conditioned upon his faithful performance of his contractual employment obligations to plaintiffs, and that Kline breached those obligations in material respects, the next inquiry is whether the Court should decree that Kline has become disentitled to claim an interest in

the Tampa property. I hold that such a degree should enter.

If Kline had performed faithfully his employment obligations, he would have been entitled to a 15% participation in the Tampa property. By his material breach of his employment obligations, he lost that right. Even where interests in real property actually have been conveyed by deed, equitable remedies are available to extinguish the interests thereby created when the grantee fails to perform obligations under a contract of personal service and the entitlement to the property interests initially arose out of the employment agreement. See 5 Corbin, Contracts §1120 (1964); *Caramini* v. *Tegulias*, 121 Conn. 548, 186 A. 482 (1936). The classic example is conveyance to a house in return for the grantee's promise to render personal service to the grantor; upon failure of performance, a court of equity will order reconveyance of the property by way of specific restitution or cancellation of the deed. *Caramini* v. *Tegulias, supra.*

This doctrine is not limited to instances where the conveyance of an interest is supported solely by the promise to perform services; it extends as well to situations, such as the instant case, where the promised conveyance is in exchange for both a promise to perform services and a specific cash consideration. An example of this situation is an employee stock option agreement.

The employee, as part of his employment contract, receives the right to buy stock at a favorable price.

He pays the price and thereafter fails to abide by the terms of his employment contract. Notwithstanding his purchase of stock, he loses the right to the stock upon his material breach of his employment contract. A court of equity will order recission and restitution of the shares back to the employer, as in *Maytag Co.* v. *Alward*, 253 Iowa 45, 464-68, 112 N.W. 2d 654, 658-60, 96 A.L.R. 2d 162 (1962), where an employee failed to fulfill a three-year obligation of services after purchase of stock.

In the absence of language to the contrary in the contract, an employee benefit will be construed as being supported by the consideration of continuing employment.

> "The courts in construing particular provisions of stock-option agreements seek to give effect to the intent of the parties in entering into such arrangements, and recognize that their fundamental purpose is to secure and retain the loyal services of desirable employees, either for a stipulated period of employment or at the employer's pleasure." Annot., 96 A.L.R. 2d 176, at 187 (1964).

Specifically, in *Shipman* v. *General Transistor Corp.*, 22 Misc. 2d 632, 635, 198 N.Y.S. 2d 852, 855 (Sup. Ct., Queens Co., 1960), *aff'd*, 12 App. Div. 2d 529, 207 N.Y.S. 2d 734 (2nd Dept. 1960), the court held that, in addition to an implied covenant of good faith and fair dealing, a covenant of loyalty on the part of an employee must be implied in a stock option agreement.

In *Wyles* v. *Campbell*, 77 F.Supp. 343, 347-48 (D.Del. 1948), it was held that a stock option issued as additional compensation in connection with an employment contract for a stated term implied an obligation to serve for such term.

Where the claim is made that an employee has not performed his contractual obligations, the court will examine the entire contract to determine what was the extended extent of the employee's consideration. *Lutzker* v. *Walter E. Heller & Co.*, 172 F.Supp. 77 (S.D.N.Y. 1959). And it has been held that two separate documents will be examined to determine whether continued employment was contemplated as consideration for a separately executed stock option agreement. *O'Brien* v. *United Home Life Insurance Co.*, 147 F.Supp. 761 (E.D. Mich. 1957), *aff'd*, 250 F.2d 483 (6 Cir. 1958).

Finally, it should be noted that the Court's power to decree that Kline is not entitled to claim any interest in the Tampa property does not depend on the nature of the evidence of Kline's claimed interest. That is to say, it matters not whether Kline's asserted rights in the Tampa property stem from his employment contracts (as plaintiffs say) or from his Xerox copy of the July 16, 1968 assignment of option (as defendant says). In either case, the consideration for whatever rights Kline claims to have acquired in the Tampa property was his promise faithfully to perform his employment obligations. The nature of the relief to be granted of course would vary, depending upon whether Kline's rights flow from the employment con-

tracts or the assignment of option. This becomes moot, however, in view of the Court's holding that the assignment never became effective. See findings (13) -(17) above, and the discussion of the option assignment which follows at pages 341-344.

The Court holds that, since Kline has breached his contractual employment obligations to plaintiffs in material respects, he no longer is entitled to claim an interest in the Tampa property, and a decree so declaring will enter.

IV.

The circumstances under which an assignment of the option agreement was executed by Annette Heyman on July 16, 1968 but was never delivered to Kline and specifically never was intended by the Heymans to become effective, are set forth in findings (13)-(17) above.

Whether the assignment ever became effective as a matter of law depends, initially, on the intention of the asserted assignor. 4 Corbin, Contracts §879 (1951). "Some extrinsic evidence of an intention that the instrument shall be immediately operative is necessary." 3 Corbin, Contracts §577 (1960, Supp. 1964), addition to note 25. "The most obvious form of assignment is a writing signed by the assignor and delivered to the assignee ...." 4 Corbin, Contracts §879, at 528-29 (1951). And no problem under the parol evidence rule is encountered by showing what the intention of the parties was with respect to the document

and whether it ever was intended to become operative or ever in fact became operative. "... a written document can not prove its own character ... Some parol testimony is required to prove the 'execution' of the document — the genuineness of the signature, the delivery as a true offer or acceptance of both, the expression of assent by each party." 3 Corbin, Contracts §577, at 386 (1960). If parol is permitted to show delivery and assent, obviously it is available to show lack of delivery and lack of assent. For an example of the correct use of parol to show the absence of a contract — the precise facts of this case — namely, signing of a document, non-delivery, and accidental or wrongful acquisition of the document by the party seeking to enforce it, see 3 Corbin, Contracts §577, at 389, example 2 (1960).[2A]

There is a sharp conflict between the testimony of Annette Heyman and Samuel Heyman, on the one

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[2A] Counsel for both sides agree that Connecticut law governs all contracts in this case. Under these circumstances, the Court of Appeals for this Circuit recognizes that "... where a question of state law must be determined in a diversity case, great weight should be given the determination of a district judge sitting in that state." *Lomartira* v. *American Automobile Insurance Co.*, 371 F.2d 550, 554 (2 Cir. 1967). I hold that parol evidence clearly was admissible upon the construction of Kline's employment contracts; and likewise to show non-delivery and non-effectiveness of the assignment of July 16, 1968. *Rosner* v. *Modern Maid Packers, Inc.*, 274 R.2d 685, 688 (D. Conn. 1967); *Segan Construction Corp.* v. *Nor-West Builders, Inc.*, 274 F. Supp. 691, 696 (D. Conn. 1967); *Choolgian* v. *Nordstrom*, 111 Conn. 572, 150 A. 499 (1930). See generally *Gem Corrugated Box Corp.* v. *National Kraft Container Corp.*, ____ F.2d ____ (2 Cir. 1970), slip op. 3049 (June 1, 1970); *Schiavone & Sons, Inc.* v. *Securalloy Co., Inc.*, ____ F.Supp. ____ (D. Conn. 1970), Civ. No. 13048, filed April 24, 1970.

hand, and the testimony of Kline, on the other hand, as to whether the assignment ever was delivered and ever became effective. The Heymans testified unequivocally that it was not delivered to Kline and that they specifically decided it was not to be used and was not to become effective. Kline testified that a copy of the assignment was delivered to him a few days after July 16 by Samuel Heyman.

Applying the accepted standards for determining credibility as discussed more fully at pages 344-346 below, I find Kline's testimony upon this issue to be incredible; and I accept as credible the testimony of Annette and Samuel Heyman. This determination is based primarily upon the demeanor of the respective witnesses while on the stand before me; but it is based also upon the consistency or lack of consistency of the testimony, as well as its corroboration or lack of corroboration with other credible evidence in the case.

For example, aside from Kline's specific testimony that Samuel Heyman delivered a Xerox copy of the assignment to him shortly after July 16, which I simply do not believe, its veracity is highly questionable in view of other evidence, including (i) the fact that Kline insisted upon receiving signed duplicate *originals* of his two employment contracts and he insisted that they contain conforming inked entries; (ii) the fact that Kline's $3,000 check dated July 21, 1968 (DX-E), which he claims corroborates his recollection that he received a copy of the assignment shortly after July 16, actually was not deposited until August 15 and was *numbered out of sequence* among Kline's

cancelled checks for the month of July; and (iii) the fact that the first documentary evidence of Kline's possession of a Xerox copy of the assignment is his letter to Attorney Marcus enclosing a copy of the assignment *on August 21* (PX-28B) — more than a month after he claims Samuel Heyman delivered a copy to him, at a time Heyman was away from Danbury on military reserve duty and at a time another employee (Mary Reynolds) testified Kline was busy making photocopies of a large number of documents in the Heyman office.

Upon the entire record, I hold that the assignment of the option executed by Annette Heyman on July 16, 1968 never was delivered to Kline and never became effective.

V.

As is apparent from the findings of fact set forth above at pages 309-330 and from the preceding sections of this opinion, it has been necessary for the Court to resolve issues of credibility with respect to most of the disputed matters in this case. While this is not a new experience, a brief statement of the standards applied may be appropriate.

The testimony of each of the 25 witnesses who testified during the trial has been weighed according to standards with which counsel on both sides are thoroughly familiar:

"The Court, in weighing their testimony, ap-

> plied such recognized tests as: their demeanor while on the stand; any interest they might have in the outcome of the case; any bias or prejudice for or against either party; their opportunity to observe; any reason to remember or forget; the inherent probability of their testimony; its consistency or lack of consistency; and its corroboration or lack of corroboration with other credible evidence. The testimony of the witnesses, moreover, has been weighed in the light of — and indeed has cast light upon — the exhibits ...." *Locke Manufacturing Companies* v. *United States*, 237 F.Supp. 80, 89 (D. Conn. 1964).

See also *McNellis* v. *Raymond*, 287 F.Supp. 232, 241 (N.D.N.Y. 1968), *aff'd in part, rev'd in part*, 420 F.2d 51 (2 Cir. 1970); *United States* v. *Capaldo*, 276 F.Supp. 986, 992-93 (D. Conn. 1967), *aff'd*, 402 F.2d 821 (2 Cir. 1968), *cert. denied*, 394 U.S. 989 (1969); *Lomartira* v. *American Automobile Insurance Company*, 245 F.Supp. 124, 131 (D. Conn. 1965), *aff'd*, 371 F.2d 550 (2 Cir. 1967); *Segan Construction Corp.* v. *Nor-West Builders, Inc.*, 274 F.Supp. 691, 696 (D. Conn. 1967); *Rosner* v. *Modern Maid Packers, Inc.*, 274 F.Supp. 685, 689 (D. Conn. 1967); *Westchester Fire Insurance Company* v. *Tantalo*, 273 F.Supp. 7, 15-16 (D. Conn. 1967); *United States* v. *Feudale*, 271 F.Supp. 115, 119 (D. Conn. 1967); *Pickett* v. *Nelseco Navigation Company*, 270 F. Supp. 682, 683 (D. Conn. 1967).

While the testimony of all witnesses has been carefully weighed according to what the Court believes

are the accepted standards for determining credibility, it is the testimony chiefly of Samuel Heyman that is challenged by defendant and the testimony of Kline is vigorously disputed by plaintiffs.

Since Kline's testimony is in conflict with that of nearly every other witness who testified in the case and the validity of Kline's position on the essential issues in the case necessarily turns upon his own credibility, brief reference will be made to examples of what I consider demonstrable lack of credibility on his part.

At the time of Kline's very first appearance before this Court, I found it necessary to resolve an issue of credibility against him. In support of his motion to dismiss the action for lack of in personam jurisdiction, Kline filed an affidavit, sworn to February 15, 1970, denying that personal service of process had been made upon him at his home in Largo, Florida, on the night of February 12, 1970, at 11:30 P.M., by Albert A. Estes, Sr., a process server — thus disputing the truth of Estes' sworn return of service of process on file in this Court. Kline's affidavit stated that, at the time of Estes' alleged service of process on him in Largo, he was in Orlando, Florida, approximately 100 miles away. At the hearing before me on March 3, 1970, on Kline's motion to dismiss the action, both Kline and Estes were in the courtroom. Estes testified specifically and was cross examined regarding his personal service upon Kline at his home in Largo on February 12, at 11:30 P.M., including such details as "Mr. Kline had on a bathrobe and shower shoes or

sandals" and "... he was holding a large Shepherd dog in one hand, accepted the papers in the other."[3] Although Kline was present in the courtroom throughout this testimony, he did not take the witness stand. I therefore made the following finding in my memorandum of decision of March 19, 1970, denying Kline's motion to dismiss:[4]

> "The Court finds, after an evidentiary hearing, that process was served personally on defendant at his home in Largo, Florida, on the night of February 12, 1970 by Albert A. Estes, Sr. This finding is based upon the Court's determination of the credibility of Mr. Estes whose demeanor the Court had an opportunity to observe while on the witness stand at the hearing on March 3, 1970."

At the time of the March 3 hearing, I though it was unusual that Kline, who had travelled all the way from Florida to Connecticut to be present, should not testify. Evidence subsequently developed why he chose to remain silent.

At his deposition, Kline testified that he arrived in Orlando on February 12 between 6:00 and 6:30 P.M.; and that it required between one hour and one hour and one-half to drive from Tampa to Orlando, thus fixing his departure time from Tampa between 4:30 and 5:30 P.M.

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[3]Transcript of March 3, 1970, pp. 30, 32.
[4]*Supra* note 1, at 12-13.

But records of the telephone company established that Kline had placed a call from Tampa at 5:44 P.M. on February 12 to one Eli First at the number 929-8564. The telephone company records also disclosed that, when Kline received the bill covering this period, he called the company to deny all knowledge of making this call, as reflected by the notation "D.A.K." on the bill.

Then when confronted with this evidence which contradicted his sworn testimony that he had left Tampa no later than 5:30 P.M., Kline changed his testimony: he conceded that he may well have made the call (of which he had denied all knowledge to the telephone company) and attempted to move up the time of his departure from Orlando so as to reconcile it with the placing of the telephone call to Eli First.

The net effect of all this serves further to confirm my earlier finding that Albert Estes was telling the truth when he testified that he personally served Kline at his home in Largo on the night of February 12; and that Kline swore falsely in his affidavit of February 15 that he was in Orlando at the time.

I also find that Kline testified falsely regarding numerous instances of excessive or fraudulent expense vouchers; and that his false testimony on these matters, in addition to being at variance with the vouchers themselves, was contradicted by the testimony which I find to be credible by the witnesses Ham Miller, Hy Goldfeld, Wes Woodson, Rick Meredith, Lee

Cobber, Ruth Bush and Manny Dakis. See findings 23 (a), 24(e), (f), (g), (h), (i), (k) and (n) above.

I also find Kline's testimony to be incredible in its conflict with that of numerous other witnesses, including present and former employees of the Heymans regarding Kline's conduct and statements; the witness Stassa regarding Kline's request that he, as a bank officer, predate a letter recommending the Heymans to a Florida bank to make it appear that the letter was written prior to the death of Lazarus Heyman; and the witness Kelman regarding Kline's denial of having asked for and received clothing from a tenant. See findings 23(c), (g) and (i) above.

As indicated at pages 343-344 above, I find incredible Kline's testimony that Samuel Heyman delivered a copy of the option assignment to him shortly after July 16, 1968; and I accept as credible the testimony of Samuel Heyman to the contrary.

These illustrations are sufficient to demonstrate the overwhelming basis in the record for my rejecting as incredible Kline's testimony on the essential issues in the case which necessarily turn upon his own credibility. And, to the extent that Kline's testimony conflicts in material respects with that of Annette and Samuel Heyman, I accept the testimony of the Heymans as credible and I reject that of Kline as incredible. In this connection, I have carefully weighed and considered the testimony of the Heymans according to the same standards for determining credibility as have been applied to the testimony of all other witnesses in the case. See pages 344-347 above.

VI.

On the basis of findings (25)-(36) above, made after an evidentiary hearing, it is clear that Kline and his attorneys, John R. Bush, Esq. and Harvey B. Oshins, Esq., are in civil contempt of this Court by reason of their violating the temporary restraining order of February 12, 1970.

Their defense at the hearing on April 27, 1970 appeared to be that the Court lacked jurisdiction. That issue has been resolved against them by the Court's memorandum of decision of March 19, 1970 denying Kline's motion to dismiss.[5] But upon the facts here established, Kline and his attorneys would be in contempt in any event, for contempt of a temporary restraining order may be committed even though the court later is held to lack jurisdiction, so long as its assertion of jurisdiction was to preserve the status quo and to determine its own jurisdiction. *United States* v. *United Mine Workers*, 330 U.S. 258, 290-94 (1947) (Vinson, C.J.); *Howat* v. *Kansas*, 258 U.S. 181, 189-90 (1922) (Taft, C.J.); *United States* v. *Shipp*, 203 U.S. 563, 573 (1906) (Holmes, J.). The Court of Appeals for this Circuit has so construed *United Mine Workers:*

> "In the United Mine Workers case it was held that except in circumstances of plain usurpation, a United States District Court has the authority to determine its own jurisdiction in a matter before it, and to maintain the *status quo*, as by issuance of a temporary restrain-

[5] *Supra* note 1.

> order, pending the determination of that issue. The Supreme Court concluded, therefore, that even should the district court be ultimately found, in such a case, to lack jurisdiction over the parties or the subject matter, it had power to punish violations of its prior restraining order as contempt." *United States* v. *Thompson*, 319 F.2d 665, 667 (2 Cir. 1963).

Where civil contempt has been established, as here, remedial sanctions may be imposed to compensate plaintiffs for the losses sustained. 5 Moore's Federal Practice ¶38.33[1], at 256-58 (2d ed. 1968); *Lance* v. *Plummer*, 353 F.2d 585, 592 (5 Cir. 1965); *Walling* v. *Crane*, 158 F.2d 80, 83 (5 Cir. 1946). Such remedial sanctions may take the form of an award of civil contempt damages. *United States* v. *United Mine Workers*, *supra*, at 302-05; *Folk* v. *Wallace Business Forms, Inc.*, 394 F.2d 240, 242, 244 (4 Cir. 1968); *Parker* v. *United States*, 153 F.2d 66, 70 (1 Cir. 1946). Attorneys fees and expenses incurred by the party injured as the result of the contempt may be recovered as part of the compensatory award of damages for civil contempt. *Folk* v. *Wallace Business Forms, Inc.*, *supra*, at 242, 244; *Lance* v. *Plummer*, *supra*, at 590, 592; *Nelson* v. *Steiner*, 279 F.2d 944, 945, 948 (7 Cir. 1960); *West Texas Utilities Co.* v. *N.L.R.B.*, 206 F.2d 442, 448-49 (D.C. Cir. 1953), *cert. denied*, 346 U.S. 855 (1953); *Textag Co.* v. *Hayslip*, 192 F.2d 435, 437-38 (5 Cir. 1951). And advice of counsel is not a defense to an act of contempt. *United States* v. *Goldfarb*, 167 F.2d 735 (2 Cir. 1948); *Eustace* v. *Lynch*, 80 F.2d 652, 656 (9 Cir. 1935).

It should be noted that, while Kline and Attorney Bush were present at the contempt hearing on April 27, 1970, Attorney Oshins was not. Oshins, however, was given notice of the hearing and was specifically directed to be present. He had appeared in this Court on behalf of Kline on two prior occasions, i.e. on February 20 and February 24, 1970. At the time of his appearance on February 20, the following colloquy took place between Judge Blumenfeld and Oshins:[6]

> "MR. OSHINS: Counsel for the plaintiff has indicated that in direct opposition to this order that the Florida action has been commenced; and this is based upon counsel's determination that jurisdiction of this Court has been obtained; therefore, that that particular action had been commenced.
>
> THE COURT: Oh, I see. He did that on advice of counsel?
>
> MR. OSHINS: He most certainly did.
>
> This is the urgency that I was trying to throw forward to you.
>
> Since you have put it over until Tuesday morning we will evaluate our position and move forward on Tuesday.

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[6]Transcript of February 20, 1970 Hearing Before Honorable M. Joseph Blumenfeld, p. 11.

THE COURT: Yes.

If you expect that to relieve you of whatever possible contempt your client is in, I would suggest that you research a little more fully the jurisdictional power of the State of Connecticut.

MR. OSHINS: I appreciate your advice."

At the April 27 contempt hearing, Attorney Bush testified that Oshins had brought to Bush's attention the colloquy with Judge Blumenfeld set forth above; that Bush had talked to Oshins specifically regarding the temporary restraining order; and that Bush's conversations with Oshins were primarily for the purpose of firming up the complaint in Kline's Florida lawsuit. I am firmly convinced that Oshins, who deliberately absented himself from the April 27 contempt hearing, was, among Kline's battery of defense counsel the key figure in advising and acting in direct defiance of this Court's temporary restraining order of February 12, 1970.

The contempt aspect of this case has been especially agonizing to me. I doubt that there is a judge in the federal service more sensitive than I to the responsibilities of making a contempt adjudication, particularly when an attorney is the alleged contemnor. When the acts of contempt demonstrate such a clear contumacious disregard of the authority of the Court as here, however, the duty of the Court is plain.

VII.

With respect to the remedies to be provided, it follows from the Court's findings of fact, conclusions of law and opinion that plaintiffs are entitled to a declaratory judgment (Order, paragraphs (1) and (2), *infra* at page 355-356); preliminary and permanent injunctions (Order, paragraphs (3) and (4), *infra* at page 356); attorney's fees and expenses incurred as a result of the civil contempt committed by defendant and his attorneys (Order, paragraph (5), *infra* at page 357); and damages resulting from defendant's breach of his employment obligations to plaintiffs (Order, paragraph (6), *infra* at page 357).

In order properly to determine the damages to which plaintiffs are entitled, the Court is appointing a Special Master to hear and report on that issue. Rule 53, Fed. R. Civ. P. Among the elements of damages which should be determined, but without limitation, are the following: expenses wrongfully charged by Kline to plaintiffs; that portion of his salary and expenses paid by plaintiffs while Kline was not faithfully performing his employment obligations; and damages sustained by plaintiffs as a result of Kline's causing employees to leave and his impairment of business relations with tenants. The Special Master may take such additional evidence on the issue of damages as he considers necessary; and he is requested to include in his report appropriate findings of fact and conclusions of law.

The Court, recognizing the merit of counsel's suggestion, will afford an opportunity for them to be heard

on the form of final judgment to be entered herein, including all aspects of the remedies to be provided. To conserve time and expense, counsel will be heard on the form of final judgment simultaneously with the hearing on the Special Master's report (Order, paragraph (10) *infra* at page 358.)

It also follows from the Court's findings of fact, conclusions of law and opinion that defendant's counterclaim must be dismissed and his motion for a temporary restraining order or preliminary injunction must be denied.

All claims of fact and law raised by all parties have been carefully considered by the Court. In order not unduly to lengthen this memorandum of decision, all claims of fact and law by any party, not specifically adopted herein, have been rejected. Likewise, any motions to strike evidence or any other motions upon which the Court reserved decision at the time of trial, to the extent they are inconsistent with the Court's findings of fact, conclusions of law and opinion, are denied; otherwise, they are dismissed as moot.

JUDGMENT OF SEPTEMBER 30, 1970

ORDER

ORDERED, ADJUDGED AND DECREED that:

(1) Defendant, Robert S. Kline, has no right, title or interest in

(a) the real property described in Exhibit A attached to the amended complaint;

(b) the real property described in Exhibit B attached to the amended complaint; or

(c) the lease dated February 1, 1969 between Annette Heyman, landlord, and Tampa Mall, Inc., tenant.

(2) Plaintiffs are not obligated to pay defendant, Robert S. Kline, any further compensation, commission or other benefits.

(3) Defendant, Robert S. Kline, his agents, servants, attorneys, nominees and persons with whom he is in active concert or participation, be, and they hereby are, permanently enjoined from initiating any legal proceedings, filing any documents on land records, or making any assertions to any financial institutions, Tampa Mall, Inc., or others, in which said defendant claims any right, title or interest in the real property and lease referred to in paragraph (1) (a), (b) and (c) of this order.

(4) Defendant, Robert S. Kline, within ten (10) days from the date of this order, shall release and effectively remove from the land records of Hillsborough County, Florida, the copy of the assignment of the option executed by Annette Heyman on July

16, 1968 which said defendant recorded on said land records on or about September 16, 1969.

(5) Plaintiffs shall recover from defendant, Robert S. Kline, and his attorneys, John R. Bush, Esq. and Harvey B. Oshins, Esq., the sum of $3,194.57, representing reasonable expenses incurred by plaintiffs as a result of the acts of civil contempt committed by defendant and his said attorneys in violating this Court's temporary restraining order of February 12, 1970.

(6) Plaintiffs shall recover from defendant, Robert S. Kline, such amount of damages resulting from his breach of his employment obligations to plaintiffs as the Court subsequently shall determine plaintiffs are entitled to, following action by the Court upon the report to be filed within 45 days from the date of this order by Thomas D. Clifford, Esq., who hereby is appointed Special Master, pursuant to Rule 53, Fed. R. Civ. P., to hear and report upon the said issue of damages to be recovered by plaintiffs from defendant; the undersigned Chief Judge of this Court having determined that appointment of a Special Master for the limited purpose stated above is warranted (i) by the difficulty in determining and computing damages in this particular case, and (ii) by the extraordinary backlog of civil and criminal cases await-

ing trial in this District which has created exceptional conditions with respect to the administration of the judicial business of this Court.

(7) Defendant's counterclaim asserted herein in all respects is dismissed on the merits.

(8) Defendant's motion for a temporary restraining order or a preliminary injunction is denied.

(9) Costs shall be taxed according to law in favor of plaintiffs and against defendant.

(10) The Clerk of this Court shall enter final judgment in accordance with the foregoing provisions of this order after the Court acts upon the report of the Special Master provided for in paragraph (6) of this order upon the issue of damages to be recovered by plaintiffs from defendant; and after counsel for the respective parties have been afforded an opportunity to be heard on the form of final judgment to be entered herein, which opportunity shall be afforded simultaneously with the hearing on the Special Master's report.

The foregoing constitute the Court's findings of fact and conclusions of law pursuant to Rule 52(a), Fed. R. Civ. P.

Dated at Bridgeport, Connecticut, this 26th day of June, 1970.

(Signed) WILLIAM H. TIMBERS
William H. Timbers
Chief Judge

MASTER'S REPORT AND ADOPTION OF THE SAME BY DISTRICT COURT

Filed, New Haven, Conn., Aug. 10, 1970 Civ. B-12

MASTER'S REPORT

TO THE HONORABLE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT:

The above-entitled cause was referred to me as Special Master by an order of reference dated June 26, 1970, directing me to hear and report the amount of damages plaintiffs are entitled to recover from defendant, including, without limitation, expenses wrongfully charged by defendant to plaintiffs, that portion of his salary and expenses paid by plaintiffs while defendant was not faithfully performing his employment obligations; and damages sustained by plaintiffs as a result of defendant's causing employees to leave and his impairment of business relations with tenants.

Having heard the evidence, in the presence of the parties and their counsel, and having reviewed the entire transcript of the evidence adduced at the prior trial on the question of liability and the respective briefs for both parties, I herein make my finding of fact, opinion and conclusions of law on the issue of damages.

I

Findings of Fact

1. The findings of fact of this Court contained in its memorandum of decision dated June 26, 1970, paragraphs (D)(23)(a) through (D)(23)(k) are hereby incorporated by reference as findings of fact for the purpose of this report.

2. The findings of fact of this Court contained in its memorandum of decision dated June 26, 1970, paragraphs (E)(24)(a) through (E)(24)(n) are hereby incorporated by reference as findings of fact for the purpose of this report.

3. The contracts of employment in question her do not provide for apportionment of compensation to periods of time or compensation apportioned to the completion of specified items of work.

4. The employment contracts of defendant with plaintiffs, besides calling for a per annum salary, included as compensation, at various times during the terms of the contract, the use of a leased automobile, reimbursement of reasonable, necessary and ordinary

business expenses incurred pursuant to his employment, and his personal living expenses.

5. Defendant's breach of his employment contracts with plaintiffs was substantially continuous from their inception in March 1968 to the time of defendant's discharge in January 1969.

6. The conduct of defendant in materially breaching his employment contracts with plaintiffs included a breach of his duty of loyalty to plaintiffs.

7. The conduct of defendant in materially breaching his employment contracts with plaintiffs was willful and deliberate.

8. The breach by defendant of his employment contracts in their material respects was not known to plaintiffs prior to defendant's discharge.

9. The gross salary paid to defendant by plaintiffs during defendant's employment totaled $19,999.97 and was compensation to defendant.

10. The claims of defendant for expenses, fraudulently presented by defendant, and for which he was reimbursed by plaintiffs, total $775.00 and fraudulently received by defendant as compensation.

11. Expenses of $295.18 for the week ending December 11, 1968, and paid by plaintiffs, were incurred by defendant in violation of Mr. Samuel Heyman's instructions and were excessive.

12. Commencing April 18, 1968, through August 19, 1968, plaintiffs spent $1,413.30 for the personal air travel of defendant and was compensation to defendant.

13. Commencing May 15, 1968 through the month of January 1969, plaintiffs spent $2,063.26 for the personal car rental of defendant and was compensation to defendant.

14. Commencing June 13, 1968 through September 2, 1968, plaintiffs spent $905.87 for defendant's personal living expenses and was compensation to defendant.

15. During the course of defendant's employment contracts with plaintiffs, plaintiffs paid $3,017.84 directly to or on behalf of defendant for business related expenses including air travel and car rental and was not compensation to defendant.

16. Defendant, by deliberately causing the resignation of four employees of plaintiffs, created the necessity for plaintiffs to hire two replacements at a cost of $588.80 in employment agency fees.

17. Plaintiffs entered into a severance pay agreement for $1,800.00 with Eva Lambert, one of the employees who resigned because of defendant's conduct.

18. While there was some evidence that this severance pay was made because Eva Lambert was treated badly by defendant, the severance pay arrangement was made partly in resolution of a claim for overtime pay and primarily in recognition of Eva Lam-

bert's past loyal services to the late Lazarus Heyman.

19. Defendant, on numerous occasions during his employment with plaintiffs, abused plaintiffs' tenants; dealt with clients in a very high-handed and arrogant manner; some tenants refused to see defendant, to do business with him and refused to speak to him; a great number of tenants found the defendant to be insulting and arrogant; defendant on one occasion created a situation whereby a tenant had to retain an attorney to replace a furnace in one of plaintiffs' stores when the lease clearly placed the burden on plaintiff for such replacement.

20. Defendant's conduct toward the tenants of plaintiffs created a bad public relations impression with tenants particularly in the transition period between the death of Lazarus Heyman and the full time attention of Samuel Heyman to plaintiffs' business.

21. Plaintiffs' business interest was dependent, to a great extent, upon a cordial relationship with their tenants and their ability to retain tenants and attract new tenants.

22. There is no evidence of special monetary damages due to defendant's course of abusive conduct with tenants of plaintiffs.

23. The deliberate actions of defendant in abusing tenants of plaintiffs, requesting a bank used by plaintiffs to perform a fraudulent act, were intentional doing of harmful acts without legal, social justification

or excuse and resulted in the impairment of plaintiffs' good will.

24. Defendant's conduct, in deliberately causing the resignation of four of plaintiffs' employees, caused upset in the plaintiffs' business affairs, required the hiring and training of two new employees with the attendant disruption of plaintiffs' business affairs.

25. Plaintiffs, on at least one occasion, had to pay a higher interest rate than usual to the Fairfield Trust Co. on a short term loan but such interest rate was more probably due to a prevailing tight money market and the location of the building where the money was to be invested rather than the conduct of defendant as described in the Courts memorandum of decision dated June 26, 1970, (D) (23)(C).

II

Opinion

a. *Restitution of Salary and Expenses*

The general rule as to the recovery by an employer of compensation previsouly paid to an employee is reflected in the Restatement (2d) *Agency*, (1957). Section 469 states:

> "An agent is entitled to no compensation for conduct which is disobedient or which is a breach of his duty of loyalty; if such conduct constitutes a willful and deliberate breach of his contract of service, he is not entitled to

compensation even for properly performed services for which no compensation is apportioned."

That same section, under comment (e) indicates that the employer may maintain an action to recover compensation paid in ignorance of the agent's faulty conduct.

The Restatement makes a further refinement of the above rule in comments (b) and (c) to section 456 as follows:

"b. Apportioned services. If an agent is paid a salary apportioned to periods of time, or compensation apportioned to the completion of specified items of work, he is entitled to receive the stipulated compensation for periods or items properly completed before his renunciation or discharge. This is true even if, because of unfaithfulness or insubordination, the agent forfeits his compensation for subsequent periods or items.

c. Unapportioned services. If the agent has rendered services, compensation for which is not apportioned in the contract of service, and his renunciation or other breach of contract is not wilful, he is entitled to an amount equal to the fair value of his services, not exceeding the agreed compensation, minus any damage caused to the principal by his breach of contract. A breach of contract is wilful and deliberate, as those words are herein used, only when the agent, in complete disregard of his

> contractual obligations, fails to perform or misperforms the promised services and has no substantial moral excuse for so doing, or is guilty of disloyal or grossly insubordinate conduct."

The Connecticut decisions have not concerned themselves with the recovery by an employer of compensation already paid to an employee. The general rule concerning the right of an employee to recover compensation, which is really the other side of the same coin, has been stated by the Connecticut Supreme Court as follows:

> "It has long been the law of this state that in contracts of hiring there is an implied condition that the servant will perform the duties incident to his employment honestly, and will do nothing injurious to his employer's interest, and if he proves radically unfaithful to his trust or is guilty of gross misconduct he forfeits all right to compensation.
>
> *Breen* v. *Larson College*, 137 Conn. 152, 157 (1950); *Phoenix Mut. Life Ins. Co.* v. *Holloway*, 51 Conn. 310, 314 (1883).

The right to recovery by the employer is clearly set forth in *Harry R. Defler Corp.* v. *Kleeman*, 243 N.Y.S. 2d 930 (1963) as follows:

> "An employee whose actions are disloyal to the interests of his employer forfeits his right

to compensation for services rendered by him (citation omitted) and if he is paid without knowledge of his disloyalty he may be compelled to return what he has improperly received (citations omitted)."

Harry R. Defler Corp. v. *Kleeman, supra* at 938. (also allowing recovery for expenses improperly charged).

Defendant contends that he accomplished the primary purpose of his employment and that as late as December 1968 plaintiffs felt that Kline was adequately performing his contract. Support for that position is sought in the following proposition from Williston:

"If the default is so slight as not to justify discharge, or if, though sufficiently serious to justify discharge, the employer with knowledge of the facts nevertheless continues the employment, the employee is entitled to the agreed compensation. . . ."

4 Williston, *Contracts* (Rev. ed. 1936) Section 1028.

The reliance by defendant on that proposition is clearly misplaced. The material breach of the employment contracts by defendant consisted in part of a series of fraudulent acts in submitting expense vouchers, substantial antagonism of tenants, a request to plaintiffs' banker to write a fraudulent letter, unauthorized rifling of plaintiffs' personal files, carrying on a real estate brokerage business which was not

part of plaintiffs' business and deliberately causing plaintiffs' employees to resign. This catalog of events is substantially over and above a "slight default". There is, further, no evidence to support a conclusion that plaintiffs' continued defendant's employment with knowledge of the material breach recited above.

The decisions relied upon by defendant, even though denying the employer recovery of compensation, recognize that the presence of fraud, among other grounds, may allow recovery back of a voluntary payment of wages by the employer. *Joseph Toker, Inc.* v. *Cohen*, 169 A.2d 838, 844-45 (N.J. 1961). The court, on the facts there, found that there was an insufficient basis to establish fraud or bad faith on the part of the employee as would deprive him of his right to compensation for the services he had rendered. There is ample evidence in this case to establish fraud and bad faith on the part of defendant.

On the basis of the test outlined in Sections 469 and 456 of the Restatement, *Agency*, the plaintiffs should recover all compensation given to defendant within the terms of the various employment contracts.

The term "compensation" has not been judicially limited under cases determining the right of the employer to recover from the employee who has materially breached his employment contract. "Compensation" certainly includes wages, bonus, profit-sharing. Anno: *Recovery Back by Employer of Compensation Paid to Employee as Result of Mistake or the Employer's Fraud.* 88 ALR 2d 1437, 1440, 1449 (1963). The decisions have focused on money paid to or spent

directly for the benefit of the employee. I would therefore find that, under the circumstances of this case, that the "compensation" to be recovered by plaintiffs include salary to defendant of $19,999.97, fraudulent expenses of $775.00, excessive expenses of $295.18, personal living expenses of $905.87, defendant's personal air travel expenses of $1,413.30 and defendant's personal car rental expenses of $2,063.26.

b. *Tortious Interference with Contract Relations*

The deliberate actions of defendant in causing employees of plaintiffs to resign has raised the issue of damages for such action as a tortious interference with contract relations.

The general rule is that a person who maliciously causes an employee in the actual service of an employer to quit his service, to the injury of the employer, is liable in damages to the employer for such injuries as naturally result from the loss of the employee. Restatement, Torts, §766 (1939); 84 ALR 43, 77, supplemented in 26 ALR 2d 1227, 1238, §2 (1952); 45 Am. Jur. 2d, *Interference* §46. The malice involved here is legal malice, that is, the willful violation of a known right. *R an. W Hat Shop, Inc.* v. *Sculley,* 98 Conn. 1, 16-18 (1922).

The evidence in this case clearly supports a finding that the resignation of four employees of plaintiffs was due solely to the deliberate and malicious conduct of defendant. There is also evidence that special damages in the amount of $688.80 in employment agency

fees were incurred by plaintiffs. The hiring of new personnel, training them in their new positions also resulted in the disruption of plaintiffs' business affairs.

The measure of damages to the employer is not limited to recovery for the loss of services but is entitled to all damages resulting from the wrongful act. 45 Am. Jur. 2d, *Interference*, §59. I find that plaintiffs should be awarded $5,000.00 including the above special damage as compensation for defendant's tortious interference with contract relations of plaintiffs.

c. *Interference with Business Relations*

From the evidence adduced, it is abundantly clear that the actions of defendant, in his dealings with tenants of plaintiffs and other third parties, damaged the good will of plaintiffs' business affairs, particularly during the aftermath of the death of Lazarus Heyman who had personally created the good will and reputation of the plaintiffs. It was clearly a period when tenants and other business relationships were waiting to see the manner in which the business of plaintiffs would be continued. There has been no claim made by plaintiffs as to the loss of any tangible property or specified monetary losses through the impairment of good will of plaintiffs. The failure of producing such specific monetary losses does not defeat plaintiffs' claim for compensation for tortious interference with business relations. In *Seidell* v. *Taylor*, 151 P.41 (1915) the court states:

"In the trial of the case and in its instruc-

tions given to the jury, the court in effect confined respondents' measure of damage to loss of the good will of their business. It is not claimed that they lost any tangible property. That the good will was at the time of very substantial value, and that it was lost because of appellants' willful, wrongful act, as alleged in their complaint, was abundantly proven by the evidence. It is contended that the evidence wholly failed to show the value of the good will. The evidence showed the manner of carrying on the business, its receipts, expenses, and profits for some time prior to the assault in considerable detail. While the value of the good will cannot be measured thereby with any great degree of exactness, we are to remember that it was caused by a malicious willful act of appellants, and that in such case damages need not be measured with any degree of nicety, as said by Chief Justice Johnson in Burckhardt v. Burckhardt, 42 Ohio St. 474, 499,51 Am. Rep. 842:

'Where there is fraud or other intentional wrong, there is not the same strictness to exclude, remote or uncertain damages, even though punitive damages are not involved. We think the case at bar one of willful wrong, and that the language of Christancy, J., in Allison v. Chandler, 11 Mich. 552, is applicable. He says: 'The nature of the case is such as the wrongdoer has chosen to make it; and, upon every consideration of justice, he is the

party who should be made to sustain all the risk of loss which may arise from the uncertainty pertaining to the nature of the case and the difficulty of accurately estimating the results of his own wrongful act.'"
Seidell v. *Taylor, supra* at 43.

While tortious damage to good will clearly appears to be compensable, there are no Connecticut decisions squarely on point. The Connecticut approach to the recovery of damages for a tortious interference resulting in lost profits is helpful in ascertaining the certainty that damage has occurred.

"We, in this state, recognize that a cause of action does exist for unlawful interference with business and that it is not essential to that cause of action that it appear that the tort has resulted in a breach of contract to the detriment of the plaintiff. Wyeman v. Deady, 79 Conn. 414, 65 Atl. 129; Skene v. Carayanis, 103 Conn. 708, 131 Atl. 497. As we said in the Skene case (p. 714), "The law does not, however, restrict its protection to rights resting upon completed contracts, but it also forbids unjustifiable interferences with any man's right to pursue his lawful business or occupation and to secure to himself the earnings of his industry. Full, fair and free competition is necessary to the economic life of a community, but under its guise, no man can by unlawful means prevent another from obtaining the fruits of his labor.

> It does not follow from this, however, that a plaintiff may recover for an interference with a mere possibility of his making a profit. On the contrary, wherever such a cause of action as this is recognized, it is held that the tort is not complete unless there has been actual damage suffered. Pollock, Torts (14th Ed.), p. 441; Winfiled, Law of Tort (2d Ed.), p. 643; Prosser, Torts, pp. 1016 et seq."

Goldman v. *Feinberg*, 130 Conn. 671, 674-675 (1944).

It is clear from the *Seidell* decision, *supra*, that the certainty of damage must be established, but that the certainty of damages is less strict where the act complained of is wrongful. Support for the rationale of *Seidell* and the diminishing certainty of damages required in proportion to the wrongfulness of the act committed is commented upon by Professor McCormick as follows:

> "It is useful to attempt, as we have attempted in this chapter, to isolate for separate inspection, as a recurrent phase of damage litigation in general, the problem of ascertainability of the amount of loss. The development of the standard of certainty of amount is probably the most distinctive contribution of the American courts to the common law of damages. Moreover, the doctrines of certainty form perhaps the most important and characteristic part of the law of damages, in its proper

sense of the rules and practices governing the measurement of awards, as contrasted with the law of liability. However, just as every attempt to classify and discuss cases according to factual kinship roils the clear pool of doctrine, so the attempt herein to classify and treat them together because of doctrinal affinity under the standard of certainty may falsify the picture of what the courts are doing, by suggesting an illusory consistency to a single standard in the medley of litigated cases. Consequently, we must remind ourselves that, though the verbal terms of the standard of certainty may be repeated in like language, yet the actual use of it varies in the different classes of cases, and within the classes varies the slant of the balance of sympathy, justice, and equity in the particular case. It is applied with relative strictness in cases of routine breach of contract, relaxed somewhat if the breach was avoidable and deliberate, relaxed again in torts to property according to the wantonness of the act, applied still more loosely in personal injuries, and becomes shadowy, almost to vanishing, in cases of malicious wrongs. In the tort field, it has in fact no application at all to the measurement of damages to interests of personality, such as claims for pain, mental anguish, or humiliation, nor, of course, to punitive damages. Despite this close dependency of the length of the yardstick of certainty upon the type of the harm

to be measured, these two phases of a case — responsibility and ascertainability of amount — should be distinguished.

McCormick, *Damages* §26-27 (1935) (See also §§26-27).

I find that the plaintiffs should recover $10,000.00 as damages for defendant's tortious interference with plaintiffs' business relations.

III

Conclusions of Law

1. Defendant breached his contractual employment obligations to plaintiffs in material respects causing damage to plaintiffs thereby.

2. Defendant tortiously interfered with the contractual relations of plaintiffs causing damage to plaintiffs thereby.

3. Defendant tortiously interfered with the business relations of plaintiffs causing damage to plaintiffs thereby.

4. Plaintiffs have not sustained their burden of proof as to the proximate cause of the severance pay agreement with Eva Lambert.

5. Plaintiffs are entitled to money damages on the issues of damages heard by the Special Master.

IV

Conclusion

I recommend that judgment be granted in accordance with this report and that plaintiffs be awarded damages in the aggregate of $40,452.58.

Dated at New Haven, Connecticut, this 10th day of August, 1970.

(Signed) THOMAS D. CLIFFORD
Thomas D. Clifford
Special Master

JUDGMENT

This cause having been tried on the merits before this Court, the Court having rendered a Memorandum of Decision after trial on June 26, 1970, the Court having referred the question of damages to a Special Master,

the Special Master's Report having been filed August 10, 1970, and accepted by the Court on September 21, 1970, and the Court having heard the parties with respect to their claims concerning the form of final judgment, it is hereby ordered, adjudged and decreed that:

1. Defendant Robert S. Kline has no right, title or interest in

(a) the real property described in Exhibit A attached hereto;

(b) the real property described in Exhibit B attached hereto;

(c) the lease dated February 1, 1969 between Annette Heyman, landlord and Tampa Mall, Inc., tenant.

2. Plaintiffs are not obligated to pay Defendant, Robert S. Kline, any further compensation, commissions or other benefits.

3. Defendant, Robert S. Kline, his agents, servants, attorneys, nominees and persons with whom he is in active concert or participation, be, and they hereby are, permanently enjoined from initiating any legal proceedings, and from making any assertions to any financial institutions, Tampa Mall, Inc., or others, and from making any continuing claims by maintaining documents on the Land Records of Hillsborough County, Florida, in which proceedings, assertions, or claims said Defendant, Robert S. Kline, his agents, servants,

attorneys, nominees or persons with whom he is in active concert or participation, claim any right, title or interest in the real property and lease referred to in paragraph 1 (a), (b) and (c) of this Judgment, and Defendant, Robert S. Kline, his agents, servants, attorneys, nominees and persons with whom he is in active concert or participation, are also permanently enjoined from filing any document on the land records of Hillsborough County, Florida, with respect to the real property and lease referred to in paragraph 1 (a), (b) and (c) of this Judgment, except for a quit-claim deed in the form and tenor of the quit-claim deed attached hereto.

4. Defendant, Robert S. Kline, within ten (10) days from the date of this Judgment shall cause to be filed on the Land Records of Hillsborough County, Florida a quit-claim deed in the form and tenor of the quit-claim deed attached hereto, duly executed by himself and his wife Jeanne Kline and properly witnessed and attested.

5. Plaintiffs shall recover from Defendant, Robert S. Kline, and his attorneys, John R. Bush, Esquire and Harvey B. Oshins, Esquire, the sum of $3,744.57, representing reasonable expenses incurred by Plaintiffs as a result of the acts of civil contempt committed by Defendant and his said attorneys in violating this Court's temporary restraining order of February 12, 1970.

6. Plaintiffs shall recover from Defendant, Robert S. Kline, the sum of $40,452.58 representing damages

as determined by the Special Master and approved by this Court, minus $13,591.62 representing money paid by Defendant to Plaintiff Annette Heyman, leaving a net sum which Plaintiffs shall recover from Defendant pursuant to this paragraph of $26,860.96.

7. Defendant's counterclaim asserted herein in all respects is dismissed on the merits.

8. Defendant's motion for temporary restraining order or a preliminary injunction is denied.

9. Costs shall be taxed according to law in favor of Plaintiffs and against Defendant.

10. Interest shall accrue on the sums found due the Plaintiffs under paragraphs 5 and 6 herein, a total of $30,605.53, at the rate of six percent (6%) per annum from the date hereof.

* * *

(Exhibits omitted)

signed

W H T

IN THE

Supreme Court of the United States

OCTOBER TERM — 1971

No. 71-1561

ANNETTE HEYMAN, Individually;
ANNETTE HEYMAN, as Executrix of the Estate of Lazarus S. Heyman, Late of Danbury; and
PRUDENTIAL MANAGEMENT COMPANY, a Connecticut corporation,
Petitioners,

v.

ROBERT S. KLINE,
Respondent.

On Petition for Writ of Certiorari to
The United States Court of Appeals
For the Second Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM — 1971

No. 71-1561

ANNETTE HEYMAN, Individually;
ANNETTE HEYMAN, as Executrix of the Estate of Lazarus S. Heyman, Late of Danbury; and
PRUDENTIAL MANAGEMENT COMPANY,
a Connecticut corporation,
Petitioners,

v.

ROBERT S. KLINE,
Respondent.

On Petition for Writ of Certiorari to
The United States Court of Appeals
For the Second Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

PRELIMINARY NOTE

Petitioners were Plaintiffs in the United States District Court, District of Connecticut. Mrs. Heyman, one of the Petitioners, will on occasion be referred to by that name. Otherwise, Petitioners will be so referenced and Respondent will be referred to by his name, Kline.

The following references will be utilized:

Petitioners' Petition	(Pet-)
Petitioners' Appendix	(Pet.App.)
Certified Record	(R)[1]

[1] The record in this cause has been previously certified to this Court by the Petitioners. References are to particular pages of the various record documents and/or transcripts as indexed by the Clerk of the District Court.

OPINIONS BELOW

The opinions of the Court of Appeals and the District Court, District of Connecticut, are set forth in (Pet. App. B). The opinion of the Court of Appeals is reported at 456 F.2d 123 (2d Cir. 1972).

JURISDICTION

The Petitioners assert jurisdiction under 28 U.S.C. Sec. 1254(1). Kline asserts herein that by their petition, Petitioners have failed to meet the burden of Supreme Court Rule 19 in that there is no showing that the Court of Appeals has either (1) decided an important question of federal law which has not been, but should be, settled by this Court or, (2) has decided a federal question in a way in conflict with applicable decisions of this Court or other circuit courts of appeals.

CONSTITUTIONAL PROVISION

> In suits at common law, where the value in controversy shall exceed $20, the right of trial by jury shall be preserved, and no facts tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.
>
> United States Const. Amend. VII

QUESTION PRESENTED FOR REVIEW

Did the United States Circuit Court of Appeals for the Second Circuit, in rendering a decision that (1) the Respondent did not waive his right to trial by jury, and (2) Respondent was entitled to a jury trial on questions of fact common both to legal and equitable claims, decide an important question of federal law

which has not been, but should be, settled by this Court, or decide a federal question in a way in conflict with applicable decisions of this Court?

STATEMENT OF THE CASE

On February 12, 1970, Petitioners filed suit in the District of Connecticut seeking damages for Kline's breach of contract, asking for injunctive and declaratory relief to the effect that Kline had no interest in certain real estate located at Tampa, Florida. (R 30). At the same time, to bar Kline from initiating any legal proceedings against them in Florida with respect to the land, Petitioners applied for a temporary restraining order (TRO) which the District Judge (The Honorable William Timbers) signed that day. (R 31, 32). No notice of this application was given to Kline, Petitioners' counsel asserting in the application that notice should not be required because "to do so would permit the immediate and irreparable injury, loss and damage to Plaintiff Annette Heyman described in the verified Complaint. . . ."[2] The District Court determined that Kline was served that day.

On February 13, 1970, Kline filed a quiet title suit in the Circuit Court in and for Hillsborough County, Florida, alleging his 15 percent interest in the Florida real estate. (R 37, Exhibit A).

On February 20, 1970, counsel for both parties appeared before the Honorable Fred Blumenfeld, United States District Judge at Bridgeport, Connecticut. Thomas J. Dolan, Esq., appeared specially for Kline and

[2] The Statement of the Case is taken, in large part, from the opinion of the United States Court of Appeals for the Second Circuit, 456 F.2d 123, 127 *et seq.*

filed a motion to dismiss the complaint for lack of jurisdiction. (R 35). It was agreed by counsel that the ruling on that motion and the hearing on Petitioners' motion for a preliminary injunction should be postponed until February 24, when they could be heard by Judge Timbers who had issued the TRO. It was also agreed that the TRO would remain in effect until then. (R 11).

On February 24, 1970, counsel for Petitioners filed a motion charging Kline, his New York counsel and his Florida counsel, with contempt, alleging that the TRO had been violated when Kline's lawsuit was filed in Florida. (R 37). The hearing of this motion and of the other pending applications was postponed until March 3, 1970, by agreement of counsel.

On March 3, 1970, Judge Timbers heard Kline's Motion to Dismiss and later denied it. (R 45). On March 26, 1970, Kline filed his motion for a preliminary injunction. (R 48). Hearings on the motions for preliminary injunctions and for a judgment of civil contempt were postponed until March 25, 1970, Kline's counsel consenting to a continuance of the TRO.

On March 25, 1970, Judge Timbers held a reported conference with counsel in his chambers in order to schedule hearings on the motion for preliminary injunction and the motion to adjudge Kline and his attorneys in contempt. (R 14). Neither party was present, but each was represented by counsel. After some discussion, set forth in the summary of proceedings, *infra*, Judge Timbers scheduled hearings on the motions for a preliminary injunction and the motion to adjudge Kline and his attorneys in contempt. See 456 F.2d at 127. As of this hearing on March 25, the time for Kline to file

his answer to the Complaint had not elapsed and he had not filed his answer. It was agreed that (1) the answer and counterclaim would be filed by April 2, (2) the Petitioners would close pleadings by April 9, and (3) that all of the discovery would be completed by April 20. (R. 14, pp. 28-30).

On March 31, 1970, Kline filed his answer and counterclaim (R 53) seeking compensatory damages for breach of his employment contract with Annette Heyman and punitive damages for her maliciously breaching the contract and excluding him from his 15 percent interest in the Tampa land. And, on the basis of the Employment Contract and the July 16 Assignment of Option, he requested various forms of equitable relief with a view to establishing an interest in the Tampa land. Kline also claimed damages for his share (15 percent) of lease receipts emanating from a lease of the Tampa property. The answer and counterclaim were accompanied by a written demand for a jury trial. (R 53).

Petitioners then moved to strike the demand for a jury and after argument on April 20, Judge Timbers granted the motion. (R 62).

Petitioners filed their Reply to Kline's Answer, Defenses and Counterclaim, and, among other things, admitted execution and delivery of the July 16, 1968 Assignment. (R 65, pp. 5, 6).

After the District Court issued its TRO enjoining Kline from filing suit in Florida regarding the Florida property, Kline filed his Motion for Temporary Restraining Order and Preliminary Injunction enjoining Mrs. Heyman from disposing of the Florida property

until the title question was disposed of. (R 48). The District Court granted Petitioners' Motion for Preliminary Injunction and denied Kline's.

At the conclusion of the trial, the District Court granted all relief requested by Petitioners, including compensatory damages totaling $40,452.58 plus civil contempt damages of $3,744.57. However, with regard to the former figure, the court set off the sum of $13,591.62 representing Kline's payments for his 15 percent interest in the Florida property.

By its judgment, (R 99) the court ordered Kline to release his claim to the property which he did by filing a release. However, the court cited Kline and his wife for contempt because they would not jointly execute a quit claim deed to Mrs. Heyman. (R 114). Mrs. Kline was not a party and was not within the court's jurisdiction. Mrs. Heyman withdrew her motion for contempt against Kline when he *individually* executed a quit claim deed (although such was not contemplated by the judgment). Thereafter, the court held Mrs. Kline in contempt. This was reversed, there being no jurisdiction. *Heyman v. Kline,* 444 F.2d 65 (2d Cir. 1971).

The Court of Appeals reversed the judgment against Kline, including civil contempt. With regard to the latter, the court held that the District Court's issuance of the TRO was invalid. *Heyman v. Kline,* 456 F.2d 123 (2d Cir. 1972). Petitioners do not contest this holding.

Petitioners timely filed their Petition for a Writ of Certiorari.

SUMMARY OF THE PROCEEDINGS

1. The Complaint

Petitioners' summary to the extent set out in their first paragraph (Pet - 3) is accurate with regard to the claims for relief sought and the jurisdictional ground claimed.

Petitioners' Complaint (R 30) prayed for a judgment holding that Kline had no right, title or interest in the Florida property because he had breached his employment contracts with Annette Heyman in certain respects. The Complaint also claimed damages for breach of contract and expenses fraudulently incurred by Klein. The Employment Contract[3] does not purport to convey an interest in the Florida real estate to Kline. (R 53, Exhibit G).

2. Court Proceedings Setting Cause for Non-Jury Trial

Contrary to Petitioners' argumentative statement (Pet - 4), both sides did not evince an interest in securing an early date for trial. Kline had not even filed his answer, defense and counterclaim. Both sides did evince an interest in an early hearing of each application for preliminary injunction. Through his counsel, Kline advised the court that Petitioners were attempting to sell the property in question and he desired that the court enter a preliminary injunction preventing sale, thus maintaining the *status quo.* (R 48). In this regard, his counsel saw no reason why the parties could not proceed to a trial on the merits within 30 days (R 14). In response to this statement by counsel, the court

[3] The Employment Contract was not attached to the Complaint but was attached to the Answer and Counterclaim filed by Kline.

stated that he wondered if he could take up a suggestion that Mr. Dolan made, i.e., "under Rule 65(a)(2) - that the hearing on the preliminary injunction be consolidated with trial on the merits. . . ."[4] (R 14, p. 20).

Again, contrary to the assertion by Petitioners (Pet - 5), there were no "numerous off-the-record discussions." The entire colloquy is set out at (R 14, pp. 20-34). After Kline filed his answer and counterclaim, to which he endorsed his demand for jury trial, the Petitioners filed their Motion to Strike Case from Jury List, which motion was heard by the court on April 20, 1970. The entire colloquy is set out at (R 15) and affirmatively shows, by virtue of the argument by William B. Rush, Esq., attorney for Kline, there were absolutely no off-the-record statements made by Mr. Dolan on March 25. And, as stated by Mr. Rush, there was no indication that during the earlier hearings, the question of jury trial, as opposed to a peremptory hearing consolidating the application for injunction with the merits for purposes of a preliminary injunction under Rule 65(a)(2), Fed. R. Civ. P., had ever been waived or even discussed, particularly in view of the fact that the time for filing the Answer had not yet arrived under Rule 38, Fed. R. Civ. P.

On March 25, the trial judge had advised counsel that he would take up Mr. Dolan's suggestion ::— under Rule 65(2)(2) — that the hearing on the preliminary injunction be consolidated with trial on the merits . . ."

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[4] Fed. R. Civ. P. 65(a)(2) provides that after the commencement of a hearing of an application for a preliminary injunction, the court may order the trial of the action on the merits to be advanced and consolidated with a hearing of the application. *The rule further provides that this provision shall be so construed and applied as to save to the parties any rights they may have to trial by jury.*

Judge Timbers went on to say ". . . I think it would be in the interest of everybody concerned to set this down for trial on the merits *with everyone's rights preserved* . . ." (R 14, pp. 20-21). He further stated: ". . . one of the reasons I had suggested this Rule 65(a)(2) procedure was to possibly eliminate some discovery. . ." (R 14, p. 23).

3. The Answer and Counterclaim

By his answer, Kline denied that he claimed his property interest by virtue of the Employment Contract alleged in the Complaint. (R 53). He also denied that he was guilty of the matters alleged. By his Counterclaim, he claimed an interest in the Florida property, basing same upon an Assignment of Option which was "signed, sealed and delivered" to him by the Petitioners and he sought perfection of that interest through the vehicles of either constructive trust or specific performance. (R 53). He also claimed punitive damages arising out of an independent tort perpetrated upon him by the Petitioners in that they had sought to steal his property interest from him by discharging him from their employment after he had served their purposes by finding a tenant for the real estate in question. (R 53). In addition to the legal punitive damages claim, he also sought legal compensatory damages arising out of the Petitioners' breach of the employment contract and the failure of the Petitioners to pay to him lease receipts emanating from Mrs. Heyman's lease of the Florida real estate. She had executed the lease a few days after discharging him.) (R 53).

4. Reply to Counterclaim Filed by Petitioners

By their Reply to Kline's Counterclaim, Petitioners admitted that Mrs. Heyman had executed and delivered

the Assignment to Kline. (R 65, paragraphs 5, 6). They also admitted that Kline had paid for his interest in the property on the dates alleged in accordance with his obligation. (R 65). They admitted the execution of Kline's Employment Contract which occurred after the delivery of the Assignment of Option, which contract recognized and confirmed that Kline had "opted" to acquire a 15 percent share in the Tampa real estate and be a 15 percent partner therein. (R 65). The contract, which Petitioners admitted, also provided that with regard to any other real estate transactions, Kline would be a 15 percent partner if he so elected. (R 53, Exhibit G). As their first affirmative defense, the Petitioners alleged that Kline was not entitled to enforce any obligations against the Plaintiffs because he had breached the employment contract. However, there was no allegation just what legal relationship, if any, the Employment Contract bore to the Assignment of Option.

5. The Trial

Throughout the trial there existed a factual issue as to what exactly constituted the "contract" between the parties. During the trial, Petitioners, through Samuel J. Heyman, attempted to prove by parol evidence that although he had been willing to recognize Kline's 15 percent interest in the property, as well as his participation in the business venture, such was *conditioned* upon his Employment Agreement and that he advised Kline that at some *appropriate* time he would give him some type of agreement which would embody those conditions. (R 16, pp. 156-158). Objections, premised upon the parol evidence rule, by Kline's counsel were overruled by Judge Timbers. In colloquy between the court and counsel, Kline's counsel stated that Kline

had denied that he claimed a property interest (as distinguished from a partnership interest) by virtue of the employment contracts, that he claimed his real estate interest by virtue of the Assignment of Option.[5] The court agreed with Petitioners' counsel who had argued that Kline, by denying that he claimed a property interest by virtue of the Employment Contract, could not frame the issues to suit his convenience.

The Assignment of Option (R 53, Exhibit F) shows on its face that it was "signed, sealed and delivered" by Mrs. Heyman. This was admitted by her in the Reply to the Counterclaim. At the trial, Respondent proved that Samuel J. Heyman paid for his interest, 28 percent, in the same fashion that Kline was paying for his 15 percent. All payments were up to date. However, the trial court ruled that there had never been any delivery of the Assignment and therefore dismissed all of Kline's claims, including his claim to a 15 percent interest in the property.

THE DECISION OF THE COURT OF APPEALS

1. Kline Did Not Waive Jury Trial

At the time of the March 25 conference, Kline still had not filed his answer because it was not yet due. Accordingly, he was entitled to demand a jury trial unless he himself had waived the right or his attorney had waived the right after being authorized by Kline to do so. It was clear that no such waiver occurred. The Court of Appeals specifically noted that the District

[5] At this point in the hearing there was no indication that the Petitioners, contrary to their admission of execution and delivery of the Assignment (Summary of Proceeding, paragraph 4, *supra*) would attempt to prove that Mrs. Heyman did not deliver the Assignment to Kline.

Judge evidently thought that the proceedings were equitable in nature because he said, "if you are talking about Rule 65 proceedings, you are talking about equitable proceedings," and therefore there is no right to a jury trial. However, the court noted, though Rule 65(a)(2) does deal with the consolidation of a hearing for a preliminary injunction with trial on the merits, the rule specifically states "this subdivision (a)(2) shall be so construed and applied as to save the parties any rights they may have to trial by jury." 456 F.2d at 130. Finally, the court stated that "agreement to a consolidation of trial on the merits with a hearing for a preliminary injunction by itself in no way amounts to a waiver of the right to jury trial." 456 F.2d at 130.

2. Factual Questions Common to Legal and Equitable Claims Must be Decided by the Jury in Order to Preserve the Integrity of the Seventh Amendment Guarantee

The Court of Appeals specifically noted the Court's concern in this type case about the *res judicata* or collateral estoppel effect of a prior determination of an equitable claim upon questions common to a legal claim, citing *Beacon Theatres, Inc. v. Westover,* 359 U.S. 500, 510-511; *Dairy Queen, Inc. v. Wood,* 369 U.S. 469, 472-473 (1962). In this regard, the court noted that counsel for Mrs. Heyman had stated (during oral argument) that in the event the court found error in the District Court's denial of Kline's demand for a jury trial, she agreed to waive all collateral estoppel effect of the District Judge's determination of the equitable claims with respect to the legal claims which must be retried. 456 F.2d at 130. However, the court observed, Kline did not make any such waiver. The court stated:

"In waiving the collateral estoppel effect of the determination of the equitable claims, Mrs. Heyman can dispose of only her own interest. But among other things, the doctrine of collateral estoppel rests 'firmly on the need to avoid conflicting adjudications (involving the same parties). . . . If possible, the same parties should not be subject to conflicting determinations on the same point, both of which are binding.' (citations omitted). In this respect, Kline has a substantial interest in the collateral estoppel effect of the the determination of the equitable claims under the employment contracts; yet, he has not entered any waiver. And even putting aside whatever interest Kline may have, this court, in furtherance of its responsibility to preserve the integrity of the judicial process, has a substantial concern in the consistent determination of any particular question. Were we to remand only the legal claims, we would create a situation ripe with the possibility of inconsistent determinations of the same question. Consequently, we conclude that all claims and counterclaims—both legal and equitable—must be remanded for retrial." 456 F.2d at 131

The court observed that, upon retrial, the jury's verdict will control whether Mrs. Heyman is entitled to any equitable and declaratory relief. The jury's determination of whether Kline breached his employment contracts and whether the Assignment of Option was effective, will lead to the eventual disposition of the equitable claims.

REASON FOR DENYING THE WRIT

Contrary to the assertion of Petitioners (Pet - 8), there is no confusion surrounding the issue of civil jury trial entitlement in the federal courts. Such has been made abundantly clear by the Court in *Beacon Theatres, Inc. v. Westover,* 359 U.S. 500 (1959), *Dairy Queen, Inc.*

v. Wood, 369 U.S. 469 (1962), and *Ross v. Bernhard,* 396 U.S. 531 (1970). It is indeed difficult to equate "overkill" and "Pavlovian response" (Pet - 9) with the Seventh Amendment guarantee to the right to trial by jury. The law review articles cited by Petitioners hardly cause confusion in the decisions enunciated by this Court, *supra.*

1. Kline Did Not Waive His Right to Trial by Jury (Petitioners' Point (1), Pet - 9)

There is no record or factual foundation for Petitioner's assertion that the "learned trial judge [relied] on the words and actions of retained counsel in finding an effective jury trial waiver." (Pet. - 9). As noted by the Court of Appeals, 456 F.2d at 127-129, Judge Timbers suggested that the parties agree to the use of the Rule 65(a)(2) F. R. Civ. P. procedure by which trial on the merits could be consolidated with a hearing on a preliminary injunction. He also suggested that the contempt motion be heard on the same date. And, during the hearing on the Motion to Strike the Demand for Jury Trial, Judge Timbers stated, "[I]f there had been any basis for claiming a jury trial, it seems to me then (March 25) and there was the time to say so. If you are talking about Rule 65 you are talking about equitable proceedings. . . . [T]here was—to me anyway—a clean and unequivocal agreement to try this case to the court without a jury as to all issues." 456 F.2d at 128-129. The "basis for claiming a jury trial" is the Seventh Amendment as reflected in Rule 38, F.R.Civ.P. In the absence of a statement by Kline or his counsel that he waived a jury trial "as to all issues," the Court of Appeals was correct in disagreeing with Judge Timbers.

> "[M]aintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care." *Dimick v. Schiedt,* 293 U.S. 475, 486 (1935). 456 F.2d at 129

Moreover,

> "[T]he right of jury trial is fundamental [and] courts [must] indulge every reasonable presumption against waiver." *Aetna Insurance Co. v. Kennedy,* 301 U.S. 389, 393 (1937). 456 F.2d at 129

The court observed that the colloquy with Judge Timbers occurred prior to the time that Kline was required to demand a jury trial under Rule 38, F.R.Civ.P. Thus,

> "[T]he nature of all the issues in the case could not have been known at the time of the March 25 conference. Kline was entitled to a jury trial on his Counterclaim which alleged that Mrs. Heyman had breached the employment contract by discharging him without cause as well as on his claim for punitive damages. See *Beacon Theatres, Inc. v. Westover* . . ." 456 F.2d at 130.

2. Kline's Right to Jury Trial of All Factual Issues Common Both to Legal and Equitable Claims Follows From the Decisions of this Court and Does Not Conflict With Any Federal Policy or Question. (Petitioners' Points (2) and (3), Pet - 9).

Petitioners' Point (2) would appear to manifest a misconstruction of *Beacon Theatres, Inc. v. Westover* and *Dairy Queen, Inc. v. Wood, supra.* Seemingly, Petitioners argue that Kline's right to jury trial should be limited to damages on the issues of breach of contract

made by each side, and that the prior determination by Judge Timbers that Kline had no interests in the property in question should be final. However, a jury, subsequently impanelled to try damages, might determine that Kline had not breached his employment contract, thus precluding the Petitioners from recovering damages against him. This jury determination would be inconsistent with the determination by Judge Timbers that Kline had no interest in the real estate because he had breached the contract. And, to carry the example to its logical end, were the jury to find that the Petitioners had breached their contract with Kline, thereby awarding damages to Kline against the Heymans, the inconsistency would be magnified.

Moreover, assuming that the Court of Appeals had merely reversed the District Court on the issue of jury trial with regard to the breach of contract rights allegedly emanating from the employment contracts, while affirming on the issue of the Assignment of Option, the trial judge would be on the horns of a dilemma. Thus, the Employment Contract recognizes that Kline had "opted" to participate in the Tampa venture. (R 53, Exhibit G). He would testify to the jury that he paid for his interest in the property at the time that Mrs. Heyman "signed, sealed and delivered" to him the Assignment of Option. Thus, the Assignment would become a relevant item of evidence even though the trial judge had previously ruled during non-jury proceedings that it was ineffective for lack of delivery. In the light of such evidence, the jury might find it difficult to find against Kline and, in the words of the Court of Appeals, such "would create a situation ripe with the possibility of inconsistent determinations of the same question. Consequently, we conclude that all claims and counter-

claims—both legal and equitable—must be remanded for retrial." 456 F.2d at 131[6]

Thus, in ruling that Kline was entitled to jury trial of all factual issues common to both legal and equitable claims, the Court of Appeals recognized that Judge Timbers' determination of the delivery issue as to the Assignment of Option might operate either by way of *res judicata* or collateral estoppel so as to conclude both parties with respect thereto at the subsequent jury trial of the damages claim. See *Beacon Theatres v. Westover, supra,* 359 U.S. at 504. And, the Court of Appeals merely followed the mandate of *Beacon Theatres* in ruling that disposition of the equitable claims must follow the jury trial of common factual issues inasmuch as a prior determination of the equitable issues would have the same effect as an equitable injunction of the legal claims. *Beacon Theatres, supra,* 359 U.S. at 507.

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[6] The Court of Appeals also held that the District Court's TRO enjoining Kline and his counsel from filing suit in Florida was improperly issued. *Kline v. Burke Construction Co.,* 260 U.S. 226 (1922). Kline and his counsel withdrew the Florida lawsuit only upon further pain of contempt, after Judge Timbers entered his interlocutory order directing that the suit be withdrawn. ——— F.Supp. ———. Thus, by the time that the decision of the Court of Appeals was rendered, two years had elapsed, during which time Kline had been improperly denied his right to litigate the issues in Florida. Had the Court of Appeals upheld the finding of the District Court on the issue of delivery of the Assignment of Option, the Petitioners would have gained some rights which arose from the issuance of the invalid TRO. (In this regard, Petitioners accept the decision of the Court of Appeals for they do not contest it.) The special defenses and counterclaim were filed only after the Florida suit had been withdrawn and in accordance with the injunction of the District Court. Had the Court of Appeals affirmed the action of the District Court, it would have sanctioned the District Court's accomplishment by indirection of that which it could not do directly through the issuance of the invalid TRO. In short, Kline had been denied his right to have the opportunity to have the issue of the assignment litigated in the Florida courts.

Finally, the Petitioners and Kline disputed the basis for the latter's property interests. Kline contended that his property interest (as distinguished from his partnership interest) had its basis in the Assignment of Option as corroborated by the Employment Contract which recognized that he had opted to participate in the venture, whereas the Heymans claimed that his property interest arose solely out of the Employment Contract.[7] By his answer to the Petitioners' Complaint, Kline denied that he claimed a property interest arising out of the Employment Contract whereas, by their Reply to Kline's Counterclaim, the Petitioners admitted execution and delivery of the Assignment of Option (although they later asserted at trial that it had never been delivered). Again, by its decision, the Court of Appeals followed this Court's mandate in *Dairy Queen, Inc. v. Wood, supra,* 369 U.S. at 479 (1962) that:

> ". . . such a defense goes to the question of just what, under the law, the contract between the respondents and petitioner is and, in an action to collect a debt for breach of a contract between these parties, petitioner has a right to have the jury determine not only whether the contract has been breached and the extent of the damages if any *but also just what the contract is.*" (Emphasis supplied)

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[7] In the Employment Contract, there are no words of conveyance of the property whereas such appear in the Assignment of Option. (R 53, Exhibit F). Moreover, the Employment Contract did not comply with the Statute of Frauds for purposes of enforceable contracts whereas the Assignment did. That is to say, the latter constituted a written promise signed by the party to be charged and, in addition, it was acknowledged and witnessed for purposes of recordation. Finally, whereas there was no exchange of money at the time of the execution of the Employment Contract, Kline paid money for his interest at the time of the delivery of the Assignment.

Petitioners' question (2) incorporates two faulty premises. First, the issues are not "basically equitable" in the law-equity merger context. *Beacon Theatres v. Westover; Dairy Queen v. Wood, supra.* Secondly, the legal claims are hardly "tenuous." Kline's legal allegations of breach of contract are traditional common law claims which contest the very basic breach of contract theories advanced by Petitioners. Kline's claims for punitive damages are well recognized common law theories.[8]

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[8] See *Brown v. Coates*, 253 F.2d 36 (D.C. Cir., 1958), Opinion by Burger, Judge, now Chief Justice. The D. C. Circuit Court affirmed judgments of compensatory and punitive damages against a real estate broker who had induced home owners to enter into a contract with him for exchange of their old house for a new one with the resulting effect that the homeowners received no money for their equity in the old house. Judge Burger, writing for the court, stated that the broker breached his fiduciary duty under circumstances wherein the victim of his tort had a right to rely upon his competence, honesty and good faith. Breach of trust warranted assessment of punitive damages as punishment of, and as a deterrent to the tortfeasor's wrongful behavior, citing *Woodward v. Ragland*, 1895, 5 App. D. C. 220; *Wardman-Justice Motors, Inc. v. Petrie*, 1930, 59 App. D. C. 262, 39 F.2d 512, 69 ALR 648; *Mills v. Levine*, 1956, 98 U.S. App. D. C. 363, 14 L.Ed. 181; *Scott v. Donald*, 1896, 165 U.S. 58, 17 S.Ct. 265, 41 L.Ed. 362; *Greene v. Keithley*, 8 Cir., 1936, 86 F.2d 238; *Scalise v. National Utility Service, Inc.*, 5 Cir. 1941 120 F.2d 938; *Reynolds v. Pegler*, 2 Cir. 223 F.2d 429, certiorari denied, 1950, 350 U.S. 846, 76 S.Ct. 80, 100 L.Ed. 754. See also 22 Am.Jur.2d. Damages, §245, .p 337. Herein, Samuel Heyman testified at trial that he had agreed to recognize Kline's interest and to deliver an appropriate deed. (R 18, pp. 419-420). Mrs. Heyman recognized that Kline had brought the lease tenant to the Heymans and because of the employment contract (which corroborates delivery of the earlier Assignment), she agreed to pay him a commission. (R. 116, Exhibit G). The Petitioners' own lawyer, Mr. Marcus, testified to correspondence which corroborates the interest. (R 18, p. 418; R 115, 28A). On August 13, 1968, Mrs. Heyman exercised the option (which was the basis of her assignment to Kline (15 percent), herself (29 percent), Samuel Heyman (28 percent), and Abigail (Weiner) Heyman (28 percent). By her letter exercising the option, Mrs. Heyman advised the optioner that her deceased husband's estate has *assigned* the decedent's option to

Therefore, it is respectfully submitted that Petitioners' question fails to raise a question envisaged by Supreme Court Rule 19 and certiorari should be denied.

3. The Court of Appeals' Decision Followed the Court's Prior Rulings That in a Cause Involving Both Legal and Equitable Claims, with Factual Issues Common to Both, the Equitable Relief Must Follow the Jury Determination of the Factual Issues Because, to do Otherwise, Might Operate Either by Way of Res Judicata or Collateral Estoppel so as to Conclude Both Parties With Respect Thereto at the Subsequent Jury Trial of Their Damage Claims. ***Beacon Theatres, Inc. v. Westover; Dairy Queen v. Wood, supra.***

By their Point (3) Pet-9), Petitioners manifest confusion in asking if there is a federal policy so favoring trial by jury that it limits developments in the law of *res judicata* and collateral estoppel. There are no aspects of *res judicata* and collateral estoppel which require "developments." Petitioners' interrogatory begs the question. Very simply, the federal policy is to grant a jury trial on factual issues common to legal and equitable claims.

> "The basis of injunctive relief in the federal courts has always been irreparable harm and inadequacy of legal remedies. At least as much is required to justify a trial court in using its discretion under the Federal Rules to allow claims of equitable

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her personally. (R 115, Exhibit G). On January 10, 1969, the proposed tenant advised that he would sign the lease within 10 days. Seven days later, Mrs. Heyman verbally (through her son, Samuel Heyman) discharged Kline and, on February 1, 1969, she executed a $5,000.00 lease to his exclusion. Obviously, such conduct does not amount to an "ambiguous" or "tenuous" claim as Petitioners suggest. (Pet 7, 12, footnotes 2, 3).

origins to be tried ahead of legal ones, since this has the same effect as an equitable injunction of the legal claims." *Beacon-Theatres, Inc. v. Westover,* 359 U.S., *supra,* at 506-507.

Thus, it may be observed that the doctrines of *res judicata* and collateral estoppel, in a mixed equity-legal context, have relevance only insofar as the mechanism of trial is concerned. By virtue of the Seventh Amendment entitlement and guarantee to jury trial, the Court has stated in no uncertain terms that, inasmuch as there is no similar guarantee with regard to non-jury trials, the jury trial must precede the disposition of equitable claims, because, to do otherwise, would impair the right to jury trial by virtue of the dictrines of *res judicata* and collateral estoppel. The Court of Appeals observed its "responsibility to preserve the integrity of the judicial process" because "[W]ere [it] to remand only the legal claims, [it] would create a situation ripe with the possibility of inconsistent determinations of the same question. Consequently, [it] conclude[d] that all claims and counterclaims—both legal and equitable—must be remanded for retrial." 456 F.2d at p. 131.

Although Petitioners choose to argue in the abstract, a factual analysis is more appropriate for purposes of the Petition when deciding whether or not the Court has before it an important question of federal law which has not been, but should be, settled by the Court. Supreme Court Rule 19. Mrs. Heyman, in suggesting to the Court of Appeals that she would waive collateral estoppel effects for purposes of the damages trial is very simply saying that she is willing to trade the risk of a jury trial on damages in return for Judge Timbers' determination that her freely executed and delivered Assignment of Option which Kline paid for, was of no force and effect. To put it another way, she suggests

that she is willing to gamble that there is more at stake with regard to the property interest than with regard to a jury trial on damages.

The Court of Appeals properly made short shrift of Mrs. Heyman's offer for the simple reason that the doctrines of *res judicata* and collateral estoppel within this context have relevance only for purposes of consistent and inconsistent jury determinations. *Beacon Theatres, Inc. v. Westover, supra.* The Court of Appeals easily perceived the true relevance of the doctrines when it recognized that "[I]n waiving the collateral estoppel effect of the determination of the equitable claims, Mrs. Heyman can dispose of only her own interest. But among other things, the doctrine of collateral estoppel rests firmly on the need to void conflicting adjudications (involving the same parties). . . . If possible, the same parties should not be subject to conflicting determinations on the same point, both of which are binding. (Citations omitted). In this respect, Kline has a substantial interest in the collateral estoppel effect of the determination of the equitable claims under the employment contracts; yet, he has not entered any waiver. And even putting aside whatever interests Kline may have, this court, in furtherance of its responsibility to preserve the integrity of the judicial process, has a substantial concern in the consistent determination of any particular question . . ." 456 F.2d at 131

Thus, to answer Petitioners' Point (3) (Pet-9), the Court will readily observe that it need not answer the question at all for the reason that it has no relevance to the doctrines of *res judicata* and collateral estoppel for purposes of consistent determinations in mixed law-equity proceedings. The Court of Appeals has insured consistent determinations by reversing the cause and

ordering that a jury trial on the common factual issues must precede determination of equitable claims. Under the federal Rules, the same court may try both equitable and legal causes in the same action. F.R.Civ.P., 1, 2, 18. Thus, the claims by the Petitioners that they did not have an adequate remedy at law and that they will suffer irreparable harm are equitable matters which "must be determined, not by precedents decided under discarded procedures, but in the light of the remedies now made available by the Declaratory Judgment Act and the Federal Rules." *Beacon Theatres, Inc. v. Westover, supra,* 359 U.S. at 507. Contrary to Petitioners' assertion as well as that of the dissenting judge in the Court of Appeals, Rule 42(b) F.R.Civ.P. may not be utilized to deprive Kline of a full jury trial on his defenses and counterclaim.[9] For to do so would recog-

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[9] It is difficult to understand Petitioners' assertion, as well as that of the dissenting judge below, that the issue of delivery of the assignment of option should be decided by the court, sitting without a jury. "[W]hether a deed has in fact been delivered is for the jury to decide, unless proof is so complete and undisputed that a verdict is demanded thereunder for one or the other party." *Thompson Real Property* (1963 Replacement Ed.) §4228. In Connecticut, it is well settled that where there is conflicting testimony on the issue of delivery, the court will afford a right to a jury trial on that issue. *Bell v. Bloom*, 146 Conn. 307, 150 A.2d 300 (1959). See also *Lomartia v. Lomartia*, 159 Conn. 558, 271 A.2d 91 (1970), (issue of delivery is for the tryer of fact). In addition, as Kline claims title by virtue of the assignment, the action would be accorded at jury trial under the Connecticut law. *National Bank of Commerce v. Howland*, 128 Conn. 307, 22 A.2d 773 (1941). In *Byrd v. Blue Ridge Rural Electric Coop.*, 356 U.S. 525 (1958), the Court noted the existence of "the federal policy favoring jury decisions of disputed fact questions" and indicated that under the doctrine of *Erie v. Tompkins*, 304 U.S. 64 (1938), the federal courts should conform to state rules in the absence of other considerations. In *Byrd, supra*, the Court held that the federal court favoring as it did a trial by jury, granted a jury trial even though the state law would require a decision by the court. In the present case, Judge Timbers' decision to deny a jury trial in a federal court where one would have existed in the state court violates the federal rule pertaining to jury trial on the

nize pre-merger law and equity principles rather than merger principles recognized and enunciated by the Court. *Bacon Theatres v. Westover, Dairy Queen v. Woods, supra.* See also *Ross v. Bernard,* 396 U.S. 531 (1970).

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issue of delivery of the Assignment. Obviously, the District Court should have granted a trial by jury as to the issue of the execution and delivery of the assignment of option. See *Meeker v. Ambassador Oil Corp.,* 375 U.S. 160 (1963).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Court should deny the Petition for Writ of Certiorari filed in this case.

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